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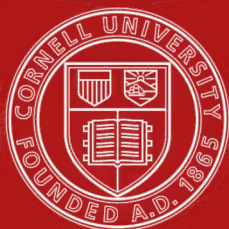
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THE Control of Public Utilities

IN THE FORM OF AN ANNOTATION OF
THE PUBLIC SERVICE COMMISSIONS LAW
OF

THE STATE OF NEW YORK

AND COVERING

ALL IMPORTANT AMERICAN CASES

TOGETHER WITH THE TEXT OF THE

FEDERAL INTERSTATE COMMERCE ACT

AND THE

RAPID TRANSIT ACT OF NEW YORK

With elaborate indexes of the same and numerous comparative notes and cross
references to parallel provisions in the several Acts

BY
WILLIAM M. IVINS
OF THE NEW YORK BAR
AND
HERBERT DELAVAN MASON
OF THE NEW YORK BAR

NEW YORK
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1908

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BY WILLIAM M. IVINS AND HERBERT DELAVAN MASON

TO
CHARLES EVANS HUGHES
GOVERNOR OF THE STATE OF NEW YORK
THIS WORK IS RESPECTFULLY DEDICATED

PREFACE.

In a noteworthy article printed in a volume of his miscellaneous speeches the late Mr. Goschen, a few years ago, called attention to the extent to which governments the world over were moving away from the theoretical economical principle of *laissez-faire* to that of government control, in these memorable words:

“ * * * among all the complicated social and economical phenomena of the present day, none appears more interesting or of deeper importance for philosophers, economists, politicians, and, indeed, for all students of the varying aspects of our national life, than the changes which have occurred and are daily occurring in the relations between the State and individual liberty. None of us can be blind to what is passing around us in this respect. Whether we look to the events of successive years, to the acts of successive Parliaments, or to the publication of successive books, we see narrower and narrower limits assigned to the application of the principle of ‘*Laissez-faire*,’ while the sphere of Government control and interference is expanding in ever widening circles.

“ The extension of State action to new and vast fields of business, such as telegraphy, insurance, annuities, postal orders, and parcels post, is not the most striking feature. What is of far deeper import is *its growing interference with the relations between classes, its increased control over vast categories of transactions between individuals, and the substitution in many of the dealings of trade and manufacture of the aggregate conscience and moral sense of the nation for the conscience and moral sense of men as units.*” * * *

In the United States down to the close of the Civil War the doctrine of *laissez-faire* had been adopted very generally as the result of the teaching of the encyclopedists and of Adam Smith, as well as of those of the later Manchester school. The national government was supposed to have no right of regulation or control over any matters not spe-

cifically delegated to it, and where the power to control through lack of such delegation remained in the several States, in the States themselves the let-alone policy was generally adopted, and in the economic evolution of corporations and particularly of corporations exercising and enjoying public franchises, the result was that not only the national interests but the interests of the people of the several States themselves were disregarded by the great corporations, which had as a rule very controlling influence not only in the State Legislatures but in the National Congress. The time at length arrived when it became imperatively necessary that there should be some co-ordination of regulative provisions, and the result was the passage by Congress of the Interstate Commerce Law, which was followed by a large body of most important constitutional jurisprudence delimiting afresh the powers of the Nation and the States, and again passing upon the great fundamental issues of nationalism and federalism.

The war for the Union was a war for nationalism as against federalism. When the truth is clearly seen it will be recognized that it was not fundamentally a war for moral principles, but one growing out of economic causes involving the question as to whether we should have a national economic state in supreme control of our share of the continent or whether there should be on the one hand a series of quasi-independent economic states, bound together by the principle of confederation as a limitation on nationality, or whether there should be two nations, one founded upon the economic principle of freedom and the other upon the economic principle of slavery. The result of the conflict was strictly in keeping with the tendency which had begun to make itself felt from the day of the adoption of the Constitution — that is to say, the tendency from federalism to nationalism. The opponents of this tendency, always seeking the largest liberty for the promotion of their individual interests as distinguished from the economic welfare of the nation, which was the exercise of the highest privilege ever enjoyed by man — namely, that of enslaving his fellow man — always and invariably sought refuge behind the doctrine of “States’ rights” and the theory of “local self-government.” The North believed that, so far

as the territories were concerned, the nation had a right to exclude slavery. The South contended the nation had no such power, and finally even secured the decision of the Supreme Court of the United States to that effect. And so "the house was divided against itself" and the conflict had become "an irrepressible one."

Now, under conditions of civilization there are in reality always two great organizations in all communities — the economic organization, which is known to publicists and economists as the Economic State, and the political organization, which is known to them as the Political State, or the Nation. The Economic State, however, is primordial, and has from the beginning of history invariably and without exception always dominated, controlled and dictated the ultimate form of the Political State. Whenever there has been a conflict between the two, whenever there has been an irreconcilable failure of coincidents, the result has been a change in the political constitution in order to reconcile it with the economic constitution. And wherever certain economic tendencies growing out of the inadequacy or insufficiency of the political constitution to protect the commonwealth have become dangerous to the people as a whole the wrong has been rectified either by constitutional evolution looking to the preservation of the national life against individual encroachment or by abrupt and cruel revolution. This is the key to the history of all revolutions, bloody or bloodless — of the Roman revolution, from the time of Gracchus to Augustus; of the Cromwellian revolution in England, of the English revolution of 1688, of the French revolution of 1789, of the revolt of the English colonies in 1776, of the South American revolutions against Spain during the first two decades of the nineteenth century, of the French revolutions of 1820 and 1848, and of the tremendous constitutional revolution in Germany which resulted in the formation of the present empire, and, it goes without saying, of our own civil war and the constitutional revolution which followed upon it.

The history of the evolution of nationalism in the United States demonstrates that the strengthening of the Nation and the weakening of the State, wherever the exercise or failure of exercise of

State power makes against the national welfare is a tendency as inevitable and as irresistible as the flow of the tides or the rising and the setting of the sun, unless it be that the nation is to enter upon a stage of dissolution instead of pursuing a normal process of evolution, which means the continuance of the vigor, and involves even the life, of the American people as a homogeneous body.

Throughout our history one or another form of economic privilege has invariably sought political license for its existence by appeal to the principle of "States' rights" or "local self-government." The present inconceivably tangled condition of affairs in the United States is due primarily to the fact that we have forty-six sovereignties, to each of which the seekers of privilege may appeal, and every one of which sovereignties may permit the existence of conditions which make against the national welfare. Thus the State of New Jersey, by its laws for the organization and management of corporations, has been the fruitful mother of legal conditions which have virtually tied the hands of the national government, and made the national law against combination tending to the creation of monopolies inimical to the welfare of the nation as a whole practically unenforceable.

The appeal will always be made, as it was made in 1832, in 1850, 1854 and in 1860, to the Constitution; and the sacredness of so-called constitutional right will be the asylum in which the enemies of the national welfare — that is to say, the welfare of the whole people as distinguished from the privilege of individuals to absorb the national wealth and to control the political power of the nation — will seek refuge. There will be endless appeals to the purpose and intention of the "Fathers." The written Constitution will be dwelt upon, and to it will be given such construction as the interests of the privileged classes may dictate.

But what is the Constitution? The *written* Constitution no more resembles the *actual* Constitution of this nation than the anatomical skeleton resembles the outward body or indicates the physiological constitution of the man. Our present Constitution is to be found not in the famous document adopted in 1787 and the amendments that have been formally made thereto, but in

the decisions of the Supreme Court of the United States, which show our constitutional law to be a thing conditioned upon and in perfect and full harmony with the economic and moral life of the people as a nation — something mobile, just as the national life is mobile; not a principle of immobility, which means death, but of mobility, which means life and growth.

Certain specific requirements of the Constitution have become absolutely dead letters, pure fiction, and bear no more relation to the existing conditions than the twelve tables bore to the Roman law in the time of Justinian. Such, for instance, is the provision with regard to presidential electors. It was an undemocratic provision and the people soon found a means for its perfect nullification. The reasons given by Hamilton for its creation were applied in another way by the people, and instead of having the President elected by a body of independent electors party conventions were invented, each convention being a body of primary electors actuated by the precise motives, as far as humanly possible, which Hamilton thought would actuate the Electoral College, but whose ultimate determination became final and conclusive upon the Electoral College and made of it a mere piece of machinery, an incumbrance, a survival fit only for the institutional scrap pile!

The clause with regard to the regulation of commerce between the States has had various interpretations according to the condition of the national economic state at the time of the interpretation; and our present constitutional law, resulting from a long series of judicial constructions, is something which would be as unrecognizable by, and as foreign to the thought of, the "Fathers" as the economic conditions under which we live would be. They never had any forethought or conception of the possibility of either, and their opinions are as valueless to us as last year's almanac or as the literature of medicine which was written before Harvey's discovery of the circulation of the blood or before the recognition of the germ theory of disease.

Vested interests always will be found looking backward and favoring the continuance of the conditions which have made possible their growth and power. The great bulk of the American people will be found looking forward and considering only those

conditions which look to a more perfect control, both State and national, in respect to all things which involve the entire nation as a commonwealth. Mr. Root's correctness of prophecy of December, 1906, that the failure of the State to curb predatory wealth will certainly result in a continuous strengthening and centralization of power in the nation is beyond question.

Even as recently as the time between the repeal of the Missouri Compromise in 1854 and the close of General Grant's second term, after reconstruction was practically accomplished, the national control of railroads and of telegraphs was practically undreamed of; and yet there is to-day no sane economist or publicist who denies the right of such national control as a constitutional necessity.

This case may be taken as typical and illustrative. The enactment of the national pure food bill — the necessity for which is undeniable — is enough to make each individual member of the Constitutional Convention of 1787 turn in his grave! Between their day and ours a complete change has come over the character of our population. Great cities and the most fruitful agricultural communities in the world have grown up in what was wilderness when Clay introduced his Compromise resolutions in 1850 and when Webster made his famous 7th of March speech. A single city has come to have a population of nearly four and a half million people, in which alone there are more Irish than in Dublin, more Italians than in Rome, more Germans than in Munich or Vienna and more Jews than there ever were in Jerusalem, if not in all of Palestine! The increment of national population from immigration alone has reached 1,300,000 a year! America is depopulating Europe, and since 1865 there has either been born or come in as immigrants a totally new people, who never think of themselves as citizens of the State in any other sense than that in which they think of themselves as citizens of their city or their village. They think of themselves first and foremost as Americans, not as Virginians, not as Pennsylvanians; and they recognize the complete and full primacy of the national government in everything which affects the national life. Wherever State laws further or abet conditions which militate against the welfare of the nation as a whole they look to the national govern-

ment to nullify such State laws; and they find the traditional division of powers between State and nation an actual hindrance to national welfare. They recognize that the United States of to-day constitutes a more homogeneous and unified people than existed in any individual State whatever in 1850, when we had less than 6,000 miles of railway, when communication with the Pacific Coast was a matter of weeks, where it is now only a matter of minutes; when the telegraph was still in its infancy and the telephone as inconceivable as the strangest miracle ever wrought by Aladdin on his wonderful lamp! Then we had a large number of what might be described as "local political nerve centres," but no true national nerve centre, because the nervous organization of the nation, which consists of its railway system, its telegraph system and its press, had not come into existence. Nor had there grown up that indestructible economic interdependence of the several States and geographical planes which has become a fundamental condition not only of our national trade and life, but of our international trade and life.

These are the facts. Generally speaking, our State governments have been more and more successive failures and our national government more and more a developing success, from the birth of the nation until to-day. And it is as preposterous that any State should be left free to create conditions which militate against the welfare of the nation as it is that any county in the State, any township, any village or any city should be left free to create conditions which militate against the welfare of the State as a larger local community.

Nowhere in the country was there greater necessity of wise, just and adequate regulation of public corporations than in the state and city of New York when Mr. Hughes was elected Governor in 1906, and no one in the State was more cognizant of this necessity for the enactment of legislation than the Governor himself, as the result of his conduct of the legislative investigation of the gas and insurance companies and his personal familiarity with the transportation problem in the city of New York. It was, therefore, no surprise to the people of the state and city that he should have laid peculiar emphasis on this necessity in his first message to the Legislature of 1907. This message sheds a very

clear light upon the purpose of the law, and it seems proper that part of it should be now republished as a matter for reference by those interested in the study of this and other similar legislation.

Speaking of public service corporations, the Governor said:

“Proper means for the regulation of the operations of railroad corporations should be supplied. For want of it, pernicious favoritism has been practiced. Secret rebates have been allowed, and there have been unjust discriminations in rates and in furnishing facilities for transportation. Those who have sought to monopolize trade have thus been enabled to crush competition and to grow in wealth and power by crowding out their rivals who have been deprived of access to markets upon equal terms. These abuses are not to be tolerated. Congress has legislated upon the subject with reference to interstate commerce, where naturally the evil has been most prominent. But domestic commerce must be regulated by the State, and the State should exercise its power to secure impartial treatment to shippers and the maintenance of reasonable rates. There is also need of regulation and strict supervision to ensure adequate service and due regard for the convenience and safety of the public. The most practicable way of attaining these ends is for the Legislature to confer proper power upon a subordinate administrative body.

“We have now a Board of Railroad Commissioners of five members. It is charged specifically with important duties. The execution of mortgages and the increase or reduction of capital stock are subject to its approval, its certificate that public convenience and necessity require the construction of a projected railroad is required before construction can be begun, and it deals with changes in highway grade crossings and various other matters in a definitive way.

“The law also provides that the board ‘shall have general supervision of all railroads and shall examine the same and keep informed as to their condition and the manner in which they are operated for the security and accommodation of the public and their compliance with the provisions of their charters and of law.’ If in the judgment of the board it appears ‘that any change of the rates of fare for transporting freight or passengers or in the mode of operating the road or conducting its business is reasonable and expedient in order to promote the security, convenience and accommodation of the public,’ it may after notice and hearing fix a time within which the changes shall be made.

“But the action of the board in the exercise of this general power of supervision amounts to a recommendation. If its direction is not complied with, the law provides that the matter shall be presented to the Attorney-General for his consideration and action, and shall be reported to the Legislature. So, if it appears that any railroad corporation has violated the law or unjustly discriminates in its charges, and the wrongful conduct is continued after notice, the matter is to be brought to the attention of the Attorney-General, ‘who shall take such proceedings thereon as may be necessary for the protection of the public interests.’

“The present scheme of regulation is inadequate. There is a lack of precision in the definition of the powers of the board and an absence of suitable means to compel compliance with its decisions. No penalties are provided for disobedience to orders of the board made within its proper authority. Nor is the board authorized to institute and conduct legal proceedings for the purpose of enforcing its requirements.

“It is also provided that the expenses of the commission shall be borne by the railroad corporations upon the apportionment of the Comptroller. This plan of reimbursing the State is wholly indefensible. The supervision of railroads is in the interest of all the people and should be borne by the people as any other expense of administration. Such a board should be established in public confidence as an independent governmental body receiving no support from the railroads save as they are duly taxed for the general support of the government.

“We have also a Commission of Gas and Electricity with broad powers with reference to corporations engaged in supplying gas and electric current.

“It is my judgment that there is no need of two separate commissions to deal with these subjects. There are now corporations which are subject to the jurisdiction of both commissions, and in some cases the same questions are presented for the decision of both. Similar principles are applicable to the decision in many cases within the jurisdiction of each and harmony of administration would be promoted by having a single body. It is plainly in the interest of economic administration in order to avoid the unnecessary multiplication of officers and clerical force that there should be but one commission. In the two boards we have now eight commissioners. A board of less than this number would answer both purposes.

“I therefore recommend that the present Board of Rail-

road Commissioners and the Commission of Gas and Electricity be abolished and that a new commission be constituted, with powers of regulation and supervision, within constitutional limits, of the corporations now subject to the existing commissions. The commission should have all the powers possessed by the present commissions and such additional powers as may be needed to insure proper management and operation. Its powers should be clearly defined and should embrace the power to act upon its own initiative as well as upon complaint; to pass upon the issue of stocks and bonds; to examine properties, books, and accounts; to require detailed reports in prescribed form; to prescribe reasonable rates; to require adequate and impartial service; to provide for the safety of employees and for the protection of the public; and generally to direct whatever may be necessary or proper to safeguard the public interests and to secure the fulfillment of the public obligations of the corporations under its supervision. Provision should be made for suitable inspection so that the commission may be advised as to all matters within its purview and be in a position to take action on behalf of the people without the formal institution of proceedings by complainants. A prescribed quorum should be entitled to decide all questions, and any one commissioner should be empowered to make examinations and investigations, and the proceedings and decisions of one, when approved by the board, should stand as its proceedings and decisions.

“The corporation guilty of disobedience to its orders, and all officers and other persons responsible for such disobedience, should be visited with appropriate penalties. The commission should also be entitled to institute legal proceedings for the enforcement of its orders and all such proceedings should be expedited by suitable preference in all the courts of the State. The Legislature should thus provide, within its constitutional power, adequate means for the entirely just and impartial regulation of these important public enterprises.”

Speaking of conditions in Greater New York, the Governor said:

“The problem of transportation in the territory of Greater New York demands special, prompt and comprehensive treatment. The configuration of Manhattan island and the concentration of business at its lower end, together

with the rapid growth of population, have produced an extraordinary congestion. All the existing lines, surface, elevated and subway, are overburdened and the people suffer in mind, body and estate. The worst congestion is found at the Brooklyn Bridge, due to the convergence at that point of the Brooklyn traffic. The people of Brooklyn who do business in Manhattan are subjected morning and night, not only to exasperating inconvenience, but to such maltreatment and indignities incident to their disgraceful herding that relief in the most practicable manner should be afforded them at the earliest possible moment.

“Not only are new facilities needed, which should be planned with reference both to immediate and future needs, but there is urgent necessity for more strict supervision to secure better service on existing lines. In some portions of the city antiquated horse-cars may still be seen, giving picturesque emphasis to the disregard of the public convenience. Over-capitalization and the improvident creation of guaranties and fixed charges to suit the exigencies of successive combinations entered into for the purpose of monopolizing the traffic have produced their natural results. There are such unjust burdens upon earnings and the tendency constantly to effect economies at the expense of proper service is so strong that it is imperative that the people shall have vigilant representatives clothed with ample authority to compel the corporations to perform their public duty.

“In 1891 the Legislature, for the purpose of providing for the development of additional transit facilities, passed the so-called Rapid Transit Act. It constituted a Board of Rapid Transit Commissioners, who were named in the statute. Numerous amendments have been made and additional powers conferred. The statute contains important provisions with reference to construction by the city. Through the accretions of years it has become cumbersome and extremely complicated. It needs revision. Pursuant to the provisions of this act the present subways have been constructed and plans have been made for further construction. By a recent amendment the board is authorized, with the consent of the board of estimate and apportionment of the city, to grant rights and franchises and to make contracts with reference to the construction and operation of the parts within the city of interstate trunk lines.

“We have thus in the city of New York an anomalous condition. Two boards created by the Legislature are exercising powers of the greatest importance with reference to

transportation. The Board of Rapid Transit Commissioners is dealing with the question of new facilities and is empowered to make contracts for construction and operation. It is also dealing with the question of the construction of trunk lines into or across the city. The State Board of Railroad Commissioners has general jurisdiction over the railroads of the State and has supervisory powers over the surface lines and the elevated roads in the city. It does not exercise jurisdiction over the subways, as these were constructed under the Rapid Transit Act. But while the powers of supervision are divided, the interests in control of the surface, elevated and subway lines are now united in a single corporation.

"This situation should be met by a comprehensive plan. All the operations of railroad companies in the territory of Greater New York should be under the supervision of one board. And the board that is to have the power to supervise generally these operations should have the power of initiating plans and of making contracts for the construction and operation of new lines. Instead of two boards dealing with different phases of the same problem, there should be one board empowered to deal with it in its entirety. As such a board would exercise important State powers of control and regulation, it should be a State board, and should be composed of men familiar with conditions in the territory affected. In my judgment it would not be advisable to put all these matters under the control either of the present Board of Railroad Commissioners or of the new commission which I have proposed to take its place. The urgent need of an increase in transportation facilities, and the unique conditions existing in Greater New York, justify the creation of a separate board to deal with the entire matter of transportation in that part of the State.

"I recommend that the Board of Rapid Transit Commissioners be abolished and that a new board be created, to have all the powers now exercised by the Rapid Transit Board, and also to have powers with reference to operations within the territory of Greater New York,—or if deemed advisable, within a wider district embracing the adjoining counties into which certain lines of the surface railroads extend,—similar to the powers which I have suggested should be conferred upon the new commission for the rest of the State. There would thus be included the regulation of gas and electric corporations. Provision should be made for the retention by the board of estimate and apportionment of the

city, of all the powers, including powers of approval, which it now enjoys. The commission proposed for the State generally should have jurisdiction over all traffic between points within the city of New York (or within the district as created), and points elsewhere in the State. It is believed that in this manner the whole question of transportation, and of gas and electric service, in the territory of Greater New York can be dealt with in an intelligent and efficient manner, and that to the fullest extent possible the just requirements of that great community may be satisfied."

The Public Service Commissions Law of the State of New York was passed as a result of these recommendations. It was drawn with more than ordinary care, and its history cannot be properly told without recording the carefulness with which the draft was prepared by Mr. Alfred R. Page in the Senate and Mr. Edwin A. Merritt, Jr., in the Assembly, with the constant aid of the Governor and his legal adviser, the late Dean Ernest W. Huffcutt, who finally broke down as the result of his conscientious fidelity in the performance of his duties.

The present book is designed as a working volume, adequately indexed, which will bring together in their relation to the New York law the important cases decided by our American courts in the matter of the regulation of public utilities corporations. It in fact constitutes an elaborate digest of the entire jurisprudence of the subject, but in the form of an annotated edition of the New York law.

It is offered to the profession and to legislators in the hope that it may be an effective aid in the interpretation, application and improvement of the law.

WM. M. IVINS.

New York, September, 1908.

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Titles in which the names of various public boards appear first, will be found cited as "Board of — v. —," except in the case of boards of railroad commissioners, in which case the title will be found as "Railroad Commissioners v. —." This has been done for the convenience of the user in order to bring together cases by railroad commissions and boards of railroad commissioners.

Citations which begin with the names of various associations and commercial agencies, such as Boards of Trade, Commercial Clubs, Cotton Exchanges, Freight Bureaus, Fruit Exchanges, Produce Exchanges, Manufacturers Associations, Tariff Associations, and the like, existing in cities or towns, appear with the name of such association first, followed by the name of the city or town; for example, "Board of Trade of Lincoln v. —," "Bureau of Freight of Charleston v. —," "Cotton Exchange of New Orleans v. —," "Produce Exchange of New York v. —," etc., instead of "Lincoln Board of Trade v. —," "Charleston Bureau of Freight v. —," etc.

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TABLE OF ABBREVIATIONS.

A.

Abb. N. C. (N. Y.)	Abbott's New Cases.
Abb. Pr. (N. Y.)	Abbott's Practice Reports.
Abb. Pr. N. S. (N. Y.)	Abbott's Practice Reports, New Series.
Ala.	Alabama Reports.
Allen (Mass.)	Allen's Reports.
App. Div. (N. Y.)	Appellate Division Reports.
Ark.	Arkansas Reports.
Atl.	Atlantic Reporter.

B.

Barb. (N. Y.)	Barbour's Reports.
Ben. (U. S.)	Benedict's Reports.
Binn. (Pa.)	Binney's Reports.
Black (U. S.)	Black's Reports.
Blatchf. (U. S.)	Blatchford's Reports.
B. Mon. (Ky.)	B. Monroe's Reports.
Bosw. (N. Y.)	Bosworth's Reports.

C.

Caines' (N. Y.)	Caines' Reports.
Caines' Cas. (N. Y.)	Caines' Cases.
Cal.	California Reports.
Casey (Pa.)	Casey's Reports.
C. B. N. S. (Eng.)	Common Bench Reports, New Series.
C. C. A. (U. S.)	Circuit Court of Appeals Reports (U. S.)
Cold. (Tenn.)	Coldwell's Reports.
Colo.	Colorado Reports.
Colo. App.	Colorado Appeals Reports.
Conn.	Connecticut Reports.
Cow. (N. Y.)	Cowen's Reports.
Cranch (U. S.)	Cranch's Reports.
Ct. Cl. (U. S.)	Court of Claims Reports.
Cush. (Mass.)	Cushing's Reports.

D.

Daly (N. Y.)	Daly's Reports.
D. C.	District of Columbia Reports.
Del.	Delaware Reports.
Denio (N. Y.)	Denio's Reports.
Dev. (N. C.)	Devereux's Reports.
Duer (N. Y.)	Duer's Reports.
Duv. (Ky.)	Duvall's Reports.

E.

E. D. Smith (N. Y.)	E. D. Smith's Reports.
Edw. Ch. (N. Y.)	Edward's Chancery Reports.
Exch. (Eng.)	Exchequer Reports.

F.

Fed.	Federal Reporter.
Fed. Cas.	Federal Cases.
Fla.	Florida Reports.
Flipp (U. S.)	Flippin's Reports.

G.

Ga.	Georgia Reports.
Gill & J. (Md.)	Gill & Johnson's Reports.
Gray (Mass.)	Gray's Reports.
Greater N. Y. Ch.	Greater New York Charter, L. 1901, ch. 466.

H.

Har. (Del.)	Harrington's Reports.
Hardin (Ky.)	Hardin's Reports.
Harris (Pa.)	Harris's Reports.
Hask. (U. S.)	Haskell's Reports.
Heisk. (Tenn.)	Heiskell's Reports.
Hill (N. Y.)	Hill's Reports.
How (U. S.)	Howard's Reports.
How. Pr. (N. Y.)	Howard's Practice Reports.
How. Pr. N. S. (N. Y.)	Howard's Practice Reports, New Series.
Humph. (Tenn.)	Humphrey's Reports.
Hun (N. Y.)	Hun's Reports.

I.

I. C. C. R.	Interstate Commerce Commission Reports (Strouse & Co. ed.).
Ill.	Illinois Reports.
Ill. App.	Illinois Appellate Court Reports.
Ind.	Indiana Reports.
Ind. App.	Indiana Appeals Reports.
Ind. Terr.	Indian Territory Reports.
Inters. Com. R.	Interstate Commerce Reports (Lawyers Co-op. ed.).
Interst. Com. Act.	Interstate Commerce Act, U. S. L. 1887, ch. 104; U. S. Stat. at L., vol. 24, p. 379.
Interst. Com. Commission.	Interstate Commerce Commission.
Iowa	Iowa.

J.

J. & S. (N. Y.)	Jones & Spencer's Reports.
Johns. (N. Y.)	Johnson's Reports.
Johns. Ch. (N. Y.)	Johnson's Chancery Reports.
Jurist N. S. (Eng.)	The Jurist, New Series.

K.

Kan.	Kansas Reports.
Kan. App.	Kansas Appeals Reports.
Keyes (N. Y.)	Keyes' Reports.
Kulp (Pa.)	Kulp's Reports.
Ky.	Kentucky Reports.
Ky. Dec.	Kentucky Decisions.
Ky. L. R.	Kentucky Law Reports.

L.

La.	Louisiana Reports.
La. Ann.	Louisiana Annual Reports.
Lans. (N. Y.)	Lansing's Reports.
Lea (Tenn.)	Lea's Reports.
Leigh (Va.)	Leigh's Reports.
Litt. (Ky.)	Littell's Reports.
L. R. A.	Lawyers' Reports Annotated.
L. R. H. L. (Eng.)	Law Reports, House of Lords.

M.

M. & W. (Eng.)	Meeson & Welsby's Reports.
Mass.	Massachusetts Reports.
Md.	Maryland Reports.
Me.	Maine Reports.
Metc. (Ky.)	Metcalfe's Reports.
Metc. (Mass.)	Metcalf's Reports.
Mich.	Michigan Reports.
Mich. N. P.	Michigan Nisi Prius Reports.
Minn.	Minnesota Reports.
Misc. (N. Y.)	Miscellaneous Reports.
Miss.	Mississippi Reports.
Mo.	Missouri Reports.
Mo. App.	Missouri Appeals Reports.
Mont.	Montana Reports.
Munf. (Va.)	Munford's Reports.

N.

N. C.	North Carolina Reports.
N. Dak.	North Dakota Reports.
N. E.	Northeastern Reporter.
Neb.	Nebraska Reports.
Nev.	Nevada Reports.
Nev. & Macn.	Neville & Macnamara's Reports.
N. H.	New Hampshire Reports.
N. J. Eq.	New Jersey Equity Reports.
N. J. L.	New Jersey Law Reports.
N. W.	Northwestern Reporter.
N. Y.	New York Reports.
N. Y. Civ. Serv. L.	New York Civil Service Law, L. 1889, ch. 370.
N. Y. Code Civ. Pro.	New York Code of Civil Procedure.
N. Y. Const.	New York Constitution of 1895.
N. Y. Corp. L.	New York General Corporation Law, L. 1890, ch. 563.
N. Y. Gas & El. Com. Act.	New York Gas and Electricity Commission Act, L. 1905, ch. 737.
N. Y. Pub. Serv. Com. L.	New York Public Service Commissions Law, L. 1907, ch. 429.
N. Y. Rap. Tr. Act	New York Rapid Transit Act, L. 1891, ch. 104.
N. Y. Rev. Stat.	New York Revised Statutes.
N. Y. R. R. L.	New York Railroad Law, L. 1890, ch. 565.
N. Y. St. Rep.	New York State Reporter.
N. Y. Super.	New York Superior Court Reports.
N. Y. Supp.	New York Supplement.
N. Y. Transp. Corp. L.	New York Transportation Corporations Law, L. 1890, ch. 566.
N. Y. Wkly. Dig.	New York Weekly Digest.

O.

Ohio	Ohio Reports.
Oh. C. C.	Ohio Circuit Court Reports.
Oh. Dec.	Ohio Decisions.
Oh. N. P.	Ohio Nisi Prius Reports.
Oh. St.	Ohio State Reports.
Okla.	Oklahoma Reports.
Ore.	Oregon Reports.

P.

Pa.	Pennsylvania State Reports.
Pac.	Pacific Reporter.
Pa. Co. Ct.	Pennsylvania County Court Reports.
Pa. Dist. Ct.	Pennsylvania District Court Reports.
Pa. Super. Ct.	Pennsylvania Superior Court Reports.
Paige (N. Y.)	Paige's Chancery Reports.
Pen. (Del.)	Pennewell's Reports.
Penny. (Pa.)	Pennypacker's Reports.
Pet. (U. S.)	Peter's Reports.
Phila. (Pa.)	Philadelphia Reports.
Pick. (Mass.)	Pickering's Reports.

Q.

Q. B. (Eng.)	Queen's Bench Reports.
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R.

Rawle (Pa.)	Rawle's Reports.
R. I.	Rhode Island Reports.
Rob. (La.)	Robinson's Reports.
Robt. (N. Y.)	Robertson's Reports.

S.

Sandf. (N. Y.)	Sandford's Reports.
Sandf. Ch. (N. Y.)	Sandford's Chancery Reports.
Sawyer (U. S.)	Sawyer's Reports.
S. C.	South Carolina Reports.
S. Dak.	South Dakota Reports.
S. E.	Southeastern Reports.
Serg. & R. (Pa.)	Sergeant & Rawle's Reports.
So.	Southern Reporter.
Story (U. S.)	Story's Reports.
Sup. Ct. R. (U. S.)	Supreme Court Reporter.
S. W.	Southwestern Reporter.
Sweeny (N. Y.)	Sweeny's Reports.

T.

Tapp. (Ohio)	Tappan's Reports.
Tenn.	Tennessee Reports.
Tex.	Texas Reports.
Tex. App.	Texas Appeals Reports.
Tex. Civ. App.	Texas Civil Appeals Reports.
Tex. Ct. R.	Texas Court Reporter.

U.

U. S.	United States Reports.
U. S. Comp. Stat.	United States Compiled Statutes of 1901.
U. S. Comp. Stat. Supp. 1903....	United States Compiled Statutes, Supplement of 1903.
U. S. Comp. Stat. Supp. 1905....	United States Compiled Statutes, Supplement of 1905.
U. S. Stat. at L.	United States Statutes at Large.
U. S. Const.	United States Constitution.

V.

Va.	Virginia Reports.
Vt.	Vermont Reports.

W.

Wall. (U. S.).....	Wallace's Reports.
Watts (Pa.)	Watt's Reports.
Watts & S. (Pa.).....	Watts & Sergeant's Reports.
Wend. (N. Y.)'	Wendell's Reports.
Whart. (Pa.)	Wharton's Reports.
Wis.	Wisconsin Reports.
Wkly. N. C. (Pa.)	Weekly Notes of Cases.
W. Va.	West Virginia Reports.
Wyo.	Wyoming Reports.

NOTE OF CORRECTION.

The annotations from decisions in twelfth Interstate Commerce Reports were made from the advance sheets of that volume. When the bound volume appeared the paging had been changed, with the result that the references to pages of that volume given in the annotations are generally incorrect. In order to ascertain the correct page, reference should be made to the Table of Cases Decided, which appears at the beginning of that volume.—ED.

[lxxix]

The Public Service Commissions Law

OF THE

STATE OF NEW YORK.

(Annotated with the Decisions of American and English
Tribunals.)

Being Chapter 429 of the Laws of 1907.

AN ACT to establish the public service commissions and prescribing their powers and duties, and to provide for the regulation and control of certain public service corporations and making an appropriation therefor.

Became a law, June 6, 1907, with the approval of the Governor. Passed, three-fifths being present.

Passed without the acceptance of the city of New York.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

THE PUBLIC SERVICE COMMISSIONS LAW.

- ARTICLE** I. Public service commissions; general provisions (§§ 1-23).
II. Provisions relating to railroads, street railroads and common carriers (§§ 25-40).
III. Provisions relating to the powers of the commissions in respect to "railroads, street railroads and common carriers (§§ 45-60).
IV. Provisions relating to gas and electric corporations; regulation of price of gas and electricity (§§ 65-77).
V. Commissions and offices abolished; saving clause; repeal (§§ 80-89).

* In several instances it has been found that the titles of the Articles and the headnotes of sections as given in the beginning of the Act or of the Articles thereof do not precisely correspond with such titles and headnotes as repeated later in the act. The variances are usually slight but such as they are they are shown in each instance. It is noted therefore that in this title for Article III, as repeated after § 40, *post*, the words "common carriers" precede the word "railroads" instead of following the words "street railroads and."

ARTICLE I.

Public Service Commissions; General Provisions.

SECTION 1. Short title.

2. Definitions.
3. Public service districts.
4. Commissions established; appointment; removal; terms of office.
5. Jurisdiction of commissions.
6. Counsel to the commissions.
7. Secretary to the commissions.
8. Additional officers and employees.
9. Oath of office; eligibility of commissioners and officers.
10. Offices of commissions; meetings; official seal; stationery.*
11. Quorum; powers of a commissioner.
12. Counsel to the commissions; duties.
13. Salaries and expenses.
14. Payment of salaries and expenses.
15. Certain acts prohibited.
16. Annual report of commissions.
17. Certified copies of papers filed to be evidence.
18. Fees to be charged and collected by the commissions.
19. Attendance of witnesses and their fees.
20. Practice before the commissions; immunity of witnesses.
21. Court proceedings; preference.
22. Rehearing before commission.
23. Service and effect of orders.

Section 1. Short title.—This chapter shall be known as the public service commissions law, and shall apply to the public services herein described, and to the commissions hereby created.

[The notes to this section contain many matters of a general nature which have been placed here arbitrarily, it being deemed more advisable that they appear together than that they be scattered throughout the work. The scope of the notes is therefore much broader than the scope of the section, and in order that the user may be apprised of the matter contained in the notes, an outline of the headings precedes the notes to this section.—Ed.]

Conflict of state and federal statutes,—see post, § 25, note [19].

* Headnote of section as enacted (post, § 10), has added the abbreviation, "etc."

- [1] General power to regulate property devoted to public use.
- [2] Scope of regulative power.
- [3] Railroads considered as highways.
- [4] Status of railroads.
- [5] Compensation of carrier a payment in the nature of a tax.
- [6] What constitutes a regulation.
- [7] Charter as a contract.
- [8] Franchises as property.
- [9] Rights of corporations incident to rights granted.
- [10] Reservation of power to alter or amend charters.
 - Need not be expressed in charter.
- [11] —Power to amend is continuous.
- [12] —Effect of reservation.
- [13], [14] Power to regulate not dependent on reservation of power to alter or amend charters.
- [15] Regulative acts not violative of charter or contract rights.
- [16] Exemption from public control.
 - Power of legislature.
- [17] —Necessity for consideration for such grant.
- [18] —When exemption exists.
- [19] —Such grants not favored.
- [20] —Transferability.
- [21] —Effect of reorganization or consolidation.
- [22] Source and extent of state legislative power.
- [23] Presumption of validity of statutes.
- [24] Burden of proving invalidity of statutes.
- [25] Construction of statutes susceptible of two interpretations.
- [26] When courts will pass on question of constitutionality.
- [27] Expediency and wisdom of enactments not matters for judicial determination.
- [28] Interpretation governed by legislative intent.
- [29] Weight given to legislature's interpretation of its own powers.
- [30] Legislative grants construed favorably to the public right.
- [31] Matters which may be considered in construing statutes.
- [31a] Construction of statutes declaratory of common law.
- [32] Purpose of acts regulating railroads.
- [33] Effect of previous holdings and constructions.
- [34] Reasonable and practical construction.
- [35] Statutes construed as penal.
- [36] Strict or liberal construction of statutes containing penal provisions.
- [37] Doubts to be resolved in favor of party of whom penalty is claimed.
- [38] Effect of subsequent statutes covering same subject matter.
- [39] Construction of specific provisions.
- [40] Divisibility of statutes.
- [41] Classification by a state for purpose of regulation.

[1] General power to regulate property devoted to public use.

Exemptions from public control,—see post, notes [16]–[21].

Effect of receivership of railroad on power to regulate,—see post, § 2, note [15].

When private property is devoted to public use, it is subject to public regulation.—*Munn v. Illinois*, 94 U. S. 113, affg. s. c. 69 Ill. 80.

All property is held subject to the power of the state to regulate or control its use, to secure the general safety or the public welfare.—*Bertholf v. O'Reilly*, 74 N. Y. 509.

A state is not sovereign unless it have the power to regulate all its internal commerce, and to make whatever regulations it may deem most effectual, subject only to the constitutional guaranties.—*Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657.

When the common right of all the people to travel and carry upon every public highway of the state has been changed in the special instance by the legislature into a corporate franchise, to be exercised solely by a corporate body for the public benefit, to the exclusion of all other persons, it becomes the duty of the state to see to it that the franchise and functions so put in trust be faithfully administered by the trustee.—*People v. N. Y. C. & H. R. R. Co.*, 28 Hun (N. Y.), 543.

When a corporation is clothed with the rights, powers and franchises of a common carrier, it becomes in law subject to governmental regulation and supervision.—*State v. Atlantic C. L. R. Co.*, — Fla. —, 44 So. 213.

Property devoted to public use is under public control.—*Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 Oh. St. 604.

[2] Scope of regulative power.

Power of commission to investigate whether corporations subject to the Act are complying with the terms of their franchises or charters,—see post, §§ 45, subdiv. 2, 48, subdiv. 2.

Regulative power as affected by a reservation of the power to alter or amend charters,—see post, notes [10]–[12].

Effect of various forms of ownership and control upon power to regulate,—see post, § 2, notes [12]–[16].

Distribution of regulative power between state and federal authorities,—see post, § 25, notes.

Power to compel the furnishing of sidetrack connections,—see post, § 27, note [3].

Switches as part of railroad, subject to regulation,—see post, § 27, note [10].

Power of state to require posting of tariff schedules,—see post, § 28, note [1].

Legislative control over joint tariffs,—see post, § 28, note [26].

Power of legislature to forbid discriminations,—see post, § 32, note [2].

Extent of public control over connecting carriers,—see post, § 35, note [9].

Validity of long and short haul statute,—see post, § 36, note [9].

Power to regulate limitation of liability,—see post, § 38, note [12].

Power to prevent delay in transportation,—see post, § 38, note [31].

Power to require railroads to file reports,—see post, § 46, note.

Power to require railroads to give notice of happening of accidents,—see post, § 47, note.

Power to regulate consolidations,—see post, § 54, note [3].

Effect of consolidation of railroads on regulative power,—see post, § 54, note [6].

General legislative control over gas and electrical corporations,—see post, § 66, notes [4]–[6].

Legislative control over rates to be charged by gas and electrical corporations,—see post, § 72, notes [1]–[3].

Validity of Rapid Transit Acts,—see post, § 83, note [1].

Railroads are the private property of their owners, and while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager.—*Interstate Com. Commission v. Ch. G. W. R. Co.*, 209 U. S. 108, 28 Sup. Ct. R. (U. S.) 493, affg. s. c. 141 Fed. 1003.

A requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the police power and not in violation of the constitutional inhibition against the impairment of the obligation of contract.—*Northern Pac. R. Co. v. Duluth*, 208 U. S. 583, 28 Sup. Ct. R. (U. S.) 341, affg. s. c. 98 Minn. 429, 108 N. W. 269.

To justify the state in interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.—*Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. R. (U. S.) 499; *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302.

The grant to a railway of special privileges and the assumption by it, in accepting its charter, of the obligation to transport all persons and property, upon like conditions and at reasonable rates, affect the property with a public use, and hence make it subject to legislative control, not merely for the security of passengers and freight against accidents, and for the convenience of the public, but also to prevent

extortion or discrimination in charges.—*Georgia R. & B. Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. R. (U. S.) 47, affg. s. c. 70 Ga. 694.

A state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter or unless what is done amounts to a regulation of foreign or interstate commerce.—*Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 6 Sup. Ct. R. (U. S.) 334, 388, 1191.

Railroad rates are the subject of legislative regulation.—*Seaboard Air L. R. Co. v. R. R. Commission*, 155 Fed. 792.

The legislature has the power within the limits fixed by the Constitution of the United States to prescribe maximum rates for railroads.—*Southern R. Co. v. McNeill*, 155 Fed. 756.

It being settled that Congress has authority to require that railroad rates shall be uniform, it necessarily follows that to preserve uniformity Congress may prohibit the doing of any act or thing whatever by any person or corporation calculated to impair uniformity, and may enforce such prohibitions by such penal provisions as it deems requisite.—*U. S. v. Standard Oil Co.*, 155 Fed. 305.

Power to regulate commerce includes power to regulate its adjuncts.—*U. S. v. Adair*, 152 Fed. 737.

The power to regulate interstate commerce authorizes legislation as to all the subjects of such commerce, the persons and corporations engaged in it, and the instruments by which it is carried on.—*Kelley v. Gt. Northern R. Co.*, 152 Fed. 211.

It is one of the duties of government to provide and regulate public roads and highways. The railway service is a *quasi* public business, not a strictly private enterprise. It would seem that the government ought in some way to protect the public against the evils growing out of a suspension of railroad transportation. But the remedy must rest mainly with the legislative department. The power of the courts is extremely limited.—*Chicago, B. & Q. R. Co. v. Burl. C. R. & N. R. Co.*, 34 Fed. 481.

The Interstate Commerce Commission has no jurisdiction to determine whether carriers have acted wisely or unwisely, fairly or unfairly, as between themselves, but only to inquire whether acts of the carrier infringe public rights as defined by the Interstate Commerce Act.—*New York Prod. Exch. v. B. & O. R. Co.*, 7 Inters. Com. R. 612.

The police power begins only where the Constitution ends, and the police power of the state, broad as it is, cannot sustain a legislative act which infringes constitutional guaranties.—*Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404.

The state in the exercise of its police power, and the regulating control which it has over corporations created by its authority, may exercise a general supervision over such corporations. It may prescribe the location of the tracks, the size and character of the rails, the pre-

cautions which shall be taken for the protection of the public, and the character and style of highway crossings; and no one has ever questioned that it may do whatever is necessary and proper for the public welfare in the control and regulation of the franchises which such corporations have obtained by statutory authority.—*American R. Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454n.

The manner in which an existing franchise to operate a railroad may be exercised, is a matter of regulation, and is generally within the absolute control of the legislature.—*Matter of Third Ave. R. Co.*, 121 N. Y. 536, 24 N. E. 951, 9 L. R. A. 124.

The legislature has control over a railroad corporation, and may compel the exercise of its functions and direct the management of its business and the use of the road in such a manner as will in the legislative judgment best subserve the public interest.—*People v. N. Y. L. E. & W. R. Co.*, 104 N. Y. 58, 9 N. E. 856.

The police power of the legislature is very broad and comprehensive, to promote the health, comfort, safety and welfare of society.—*Matter of Jacobs*, 98 N. Y. 98, affg. s. c. 33 Hun (N. Y.), 374.

The legislature, having control of the traffic in and use of intoxicating liquors, may make such regulations, etc., as are in its judgment calculated to achieve the ends sought.—*Bertholf v. O'Reilly*, 74 N. Y. 509.

The legislature, which has created railroad corporations, may regulate the mode in which they may transact their business, the price which they shall charge for the transportation of freight and passengers, the speed at which they may run their trains, and the way in which they may cross or run upon highways.—*People ex rel. Kimball v. Boston & A. R. Co.*, 70 N. Y. 569.

The police power of the state is very broad and comprehensive, and under it the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other.—*Wynehamer v. People*, 13 N. Y. 378.

Railroads must submit to regulations in the proper exercise of the police power of a state even though they involve some expense and inconvenience.—*Pittsburg, C. C. & St. L. R. Co. v. Hartford City*, — Ind. —, 82 N. E. 787.

While courts will arrest an arbitrary or plainly unreasonable exercise of the police power, where there has been an attempt thereby to lay a burden upon a subject in the use or enjoyment of his property, yet, notwithstanding this, the courts recognize that, as respects the police power, there is a broad authority within the field of legislative discretion, wherein, as respects what is good and expedient, the law-making power is absolutely the master of its own discretion.—*Pittsburg, C. C. & St. L. R. Co. v. Hartford City*, — Ind. —, 82 N. E. 787.

A state has power to limit the amount of charges by railroads for transportation of persons and property within its own jurisdiction, unless restrained by some contract in its charter, or unless what is done amounts to a regulation of foreign or interstate commerce.—*Attorney-General v. Old Colony R. Co.*, 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112.

The legislature may provide for the reasonable regulation of common carriers' ways of doing business.—*McGowan v. Wilmington & W. R. Co.*, 95 N. C. 417.

The state has the inherent power of regulating and controlling public service corporations operating within its borders and of prescribing the facilities and conveniences which shall be furnished by them.—*Winchester & S. R. Co. v. Commonwealth*, 106 Va. 264, 55 S. E. 692.

The rates of charges for the use of property in which the public has an interest may be fixed or limited by legislative enactments, or if the legislature has not fixed the charges to be allowed, the courts will allow the owner only a reasonable charge for its use, and will compel him to give the use of it in the manner in which he has devoted it to the public, to any person upon his paying a reasonable price therefor.—*Railroad Co. v. Transp. Co.*, 25 W. Va. 324.

[3] Railroads considered as highways.

A railroad may be viewed as a public highway under the control of a corporate body which has assumed obligations to carry persons and property in consideration of the exclusive rights to control the public thoroughfare.—*Bouker v. L. I. R. Co.*, 89 Hun (N. Y.), 202, 35 N. Y. Supp. 23.

Railroads, whether built, owned and conducted by the state or by private corporations, and whether exacting tolls or free, are public highways.—*Railroad Comrs. v. P. & O. C. R. Co.*, 63 Me. 269.

[4] Status of railroads.

A railroad once constructed is, *instantly*, and by mere force of the grant and law, embodied in the governmental agencies of the state and dedicated to public use. All and singular its cars, engines, rights of way, and property of every description, real, personal and mixed, are but a trust fund for the political power. The corporation created by the sovereign power expressly for this sole purpose and no other is, in the most strict technical and unqualified sense, but its trustee. This is the primary and sole legal motive for its creation. The incidental interest and profits of individuals are accidents, both in theory and practice.—*Talcott v. T. of Pine Grove*, 1 Flipp (U. S.), 120.

The duties, functions and property of railroad corporations are held in trust by the corporation for the public, and the sovereign power regulates such corporation as its trustee.—*People v. N. Y. C. & H. R. R. Co.*, 28 Hun (N. Y.), 543.

[5] Compensation of carrier a payment in the nature of a tax.

The fare charged for carriage on railroads is the consideration for the service performed, whether done by the state directly or by a corporation under a grant from the state; it is simply a substitute for the tax rendered necessary when the state builds and conducts railroads at the public expense; the corporation, upon the payment of the fare, is under the same obligation to render required service to the public that the state would be, if railroads were free and conducted by state authority.—*Railroad Comrs. v. P. & O. C. R. Co.*, 63 Me. 269.

[6] What constitutes a regulation.

Regulation of the franchises of street railway corporations may be by enlarging, as well as restricting, their power.—*Matter of Third Ave. R. Co.*, 121 N. Y. 536, 24 N. E. 951, 9 L. R. A. 124.

[7] Charter as a contract.

Reservation of power to alter or amend charters,—see post, notes [10]–[12].

Regulative acts not violative of charter rights,—see post, note [15].

Charter of gas corporation a contract,—see post, § 66, note [2].

A charter of incorporation granted by a state creates a contract between the state and the corporators, which the state cannot violate.—*Wilmington R. Co. v. Reid*, 13 Wall. (U. S.) 264, revg. s. c. 64 N. C. 226.

If the charter of a railroad in terms grants it power to charge a definite sum per mile, this express stipulation forms a part of the state's contract with the corporation, which succeeding legislatures may not impair without compensation.—*Pingree v. Mich. Cent. R. Co.*, 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274. See *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. R. (U. S.) 1047; *Chicago, B. & Q. Co. v. Iowa*, 94 U. S. 155.

[8] Franchises as property.

Franchise grants construed favorably to the public right,—see post, note [30].

The legislature cannot take away the franchises or property of a public service corporation by a confiscatory reduction of its rates, under the reserved power to alter or amend its charter.—*Rochester & C. T. Road v. Joel*, 41 App. Div. (N. Y.) 43, 58 N. Y. Supp. 346.

A franchise is "property" of which the owner cannot be deprived by later legislation, except by exercise of the power of eminent domain.—*Coney I. F. H. & B. R. Co. v. Kennedy*, 15 App. Div. (N. Y.) 588, 44 N. Y. Supp. 825.

The essential franchise of a private corporation is private property which cannot be taken without compensation, even for public use.—*Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140.

[9] Rights of corporations incident to rights granted.

Authority in the charter of a corporation to carry persons and property implies authority to charge a reasonable sum for the carriage.—*Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 6 Sup. Ct. R. (U. S.) 334, 388, 1191.

The power to make and vend gas, conferred upon a corporation by its charter, carries with it as an inevitable incident the right to fix the price of gas thus made and sold, so that by the terms thereof, its right to fix the price of its product is as much a part of its charter as if it were in terms set forth in the act of incorporation.—*State ex rel. St. Louis v. La Clede Gas Co.*, 102 Mo. 472, 14 S. W. 974, 15 S. W. 383.

[10] Reservation of power to alter or amend charters.—Need not be expressed in charter.

Charters of gas corporations,—see post, § 66, note [2].

While in the case of a mere private corporation, the reservation of power to alter or amend the charter must be expressed in the charter itself; in case of public corporations, or those essentially public, the reservation is understood unless negated in express words or by necessary implication.—*Winchester Turnpike Co. v. Croxton*, 98 Ky. 739, 17 Ky. L. R. 1299, 34 S. W. 518, 33 L. R. A. 177n.

[11] —Power to amend is continuous.

The power reserved to amend or alter the charter of a railroad corporation is continuous, and is not limited to a single occasion, or any number of occasions, of its exercise, then to become or be deemed to be exhausted.—*People ex rel. McConville v. Hills*, 46 Barb. (N. Y.) 340.

[12] —Effect of reservation.

Effect on power to destroy franchise rights,—see ante, note [8].

A regulative measure not inconsistent with the general object of a grant of a franchise to a railroad company, even though in conflict with the provisions of the charter as to the subject, falls within the reserved power of the state to alter, amend or repeal the original charter, and if imposed in good faith and not in sheer oppression, it is not unconstitutional.—*Fair Haven & W. R. Co. v. New Haven*, 203 U. S. 379, 27 Sup. Ct. R. (U. S.) 74.

A legislative grant of privileges to a corporation may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law revoking the exclusive character of such privileges is not an impairment of contract.—*Hamilton Gas L. & C. Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. R. 90.

The power to amend, when reserved in the charter of a railroad corporation, gives full and complete power to make such alterations, etc.,

as come within the just scope of legislative power, which includes power to regulate as to rates.—*Raworth v. No. Pac. R. Co.*, 2 Inters. Com. R. 614, 3 Inters. Com. R. 857, 5 I. C. C. R. 234.

Under the power reserved in the N. Y. Constitution to alter or amend the charters of corporations, the legislature may impose upon railroads such additional restrictions and burdens as the public good requires.—*People ex rel. Kimball v. Boston & A. R. Co.*, 70 N. Y. 569.

By the reserved power to alter, suspend or repeal the charter of a corporation (1 N. Y. Rev. Stat. 600, § 8; N. Y. Const. Art. VIII, § 1) the franchise of a street railroad corporation is subject to legislative regulation.—*Geneva & W. R. Co. v. N. Y. C. & H. R. R. Co.*, 90 Hun (N. Y.), 9, 35 N. Y. Supp. 339.

1 Rev. Stat., title 3, ch. 18, § 8, providing that the charter of every corporation thereafter granted should be subject to alteration, suspension and repeal by the legislature, authorizes a regulative act which modifies the charter of a railroad organized while such section was in effect.—*Suydam v. Moore*, 8 Barb. (N. Y.) 358.

The power reserved to alter, modify or repeal the charter of a gas corporation authorizes legislative action fixing the maximum prices to be charged for gas by such corporation.—*State ex rel. Atty.-Gen. v. Cincinnati Gas L. & C. Co.*, 18 Oh. St. 262.

The reservation by the state of the right to alter, amend or repeal a corporate charter affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the state, including its very existence; but rights and interests acquired by the corporation, not constituting a part of the contract of incorporation, and so not derived directly from the state, stand on a different footing and are not thereby subjected to legislative control.—*Lawrence v. Rutland R. Co.*, — Vt. —, 67 Atl. 1091.

[13], [14] Power to regulate not dependent on reservation of power to alter or amend charters.

Railroad corporations hold their property and exercise their functions for the public benefit, and they are therefore subject to legislative control. The legislature which has created them, may regulate the mode in which they shall transact their business, the price which they shall charge for the transportation of freight and passengers, the speed at which they may run their trains, and the way in which they may cross or run upon highways and turnpikes used for public travel. It may make all such regulations as are appropriate to protect the lives of persons carried upon railroads or passing upon highways crossed by railroads. All this is within the domain of legislative power, although the power to alter and amend the charters of such corporations has not been reserved.—*People ex rel. Kimball v. Boston & A. R. Co.*, 70 N. Y. 569.

A state may regulate foreign and domestic corporations, regardless of whether the right to amend their charters has been reserved.—*McGuire v. C. B. & Q. R. Co.*, 131 Iowa, 340, 198 N. W. 902.

A railway charter from the state authorized the corporation to “fix, regulate and receive charges.”—*Held*, that there is annexed to this grant an implied reservation of the right of the state, through a commission or otherwise, to see to it that such rates shall conform to the standards of reasonableness fixed by the state.—*Stone v. N. J. & C. R. Co.*, 62 Miss. 646; *Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607.

[15] Regulative acts not violative of charter or contract rights.

One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract concerning them.—*Hudson Water Co. v. McCarter*, 209 U. S. 349, 28 Sup. Ct. R. (U. S.) 529, affg. s. c. 70 N. J. Eq. 695, 65 Atl. 489.

It is not within the power of a city council to reduce the rates of fare on street railways whose franchises have been extended in duration on conditions involving large expense to the corporation and substantial benefits to the public.—*Cleveland v. Cleveland Elect. R. Co.*, 201 U. S. 529, 26 Sup. Ct. R. (U. S.) 513; *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 24 Sup. Ct. R. (U. S.) 756.

An act transferring from one set of public functionaries to another the expressly reserved power of the state or city to regulate the use of the streets and highways in such manner as not to injuriously affect the public interests, does not impair the obligation of franchise contracts.—*People ex rel. N. Y. Elect. L. Co. v. Squire*, 145 U. S. 175, 12 Sup. Ct. R. (U. S.) 880, affg. s. c. 107 N. Y. 593, 14 N. E. 820.

The New York Mileage Book Act (L. 1895, ch. 1027, as amd. L. 1896, ch. 835) is not unconstitutional as to a railroad corporation reorganized after the passage of such Act.—*Minor v. Erie R. Co.*, 171 N. Y. 566, 64 N. E. 454, affg. s. c. 73 App. Div. (N. Y.) 621, 76 N. Y. Supp. 513.

An act requiring railroads to issue mileage books under penalty for refusal, is unconstitutional as to existing railroad corporations, under the decision of the U. S. Supreme Court in *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684.—*Beardsley v. N. Y. L. E. & W. R. Co.*, 162 N. Y. 230, 56 N. E. 488, revg. s. c. 15 App. Div. (N. Y.) 251, 44 N. Y. Supp. 175, and 17 Misc. (N. Y.) 256, 40 N. Y. Supp. 1077.

A mileage book act, though declared by the Supreme Court of the United States to be unconstitutional as to railroad corporations formed prior to its passage, is constitutional as to a corporation thereafter incorporated.—*Purdy v. Erie R. Co.*, 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669.

Where a franchise to furnish water supply in a town is not exclusive, it does not prevent the town from contracting for a further or other supply, even though the competition may impair the value of the first franchise.—*Matter of City of Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270.

The constitutional prohibition against the impairment of contracts by legislation does not prevent the granting of franchises similar to existing ones, which impair the value of the latter.—*Matter of City of Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270.

As the legislature may take away a franchise to be a corporation and may regulate the exercise of its corporate powers, it may prescribe the conditions and terms upon which it may live and exercise such franchise.—*Mayor v. Twenty-third St. R. Co.*, 113 N. Y. 311, 21 N. E. 60.

Upon railroad corporations created by it, the legislature may impose such additional restrictions and burdens as the public good requires.—*People ex rel. Kimball v. Boston & A. R. Co.*, 70 N. Y. 569.

Every public regulation may, and does, in some sense, limit and restrict the absolute right that existed previously. But this is not to be considered an injury. So far from it, the individual, as well as others, is supposed to be benefited.—*Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349.

[16] Exemption from public control—Power of legislature.

The right of a state to exercise the police power is a continuing one and cannot be contracted away.—*Northern Pac. R. Co. v. Duluth*, 208 U. S. 583, 28 Sup. Ct. R. (U. S.) 341, affg. s. c. 98 Minn. 429, 108 N. W. 269.

A state may, in matters of proprietary rights, exclude itself from the right to regulate the price at which water shall be furnished its citizens by private companies, when the power has been clearly conferred.—*Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 27 Sup. Ct. R. (U. S.) 762.

A state legislature, unless prohibited by constitutional provisions, may authorize a municipal corporation to contract with a street railway company as to rates of fare, and so to bind during the specified period any future common council from altering or in any way interfering with such a contract.—*Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 22 Sup. Ct. R. (U. S.) 410.

The governmental power of self-protection can not be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.—*New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. R. (U. S.) 437.

The regulation of the price of gas by the state or municipalities is not the exercise of a police power which cannot be abridged by contract.—*State ex rel. St. Louis v. Laclede Gas Co.*, 102 Mo. 472, 14 S. W. 974, 15 S. W. 383.

The charter of a gas company is a contract between it and the state, and if the charter empowers the company to fix the price of its product, subsequent legislative action, state or municipal, cannot diminish the rates so fixed.—*State ex rel. St. Louis v. Laclede Gas Co.*, 102 Mo. 472, 14 S. W. 974, 15 S. W. 383.

The right to regulate tolls may be transferred by a legislature to a private corporation.—*Sloan v. Pac. R. Co.*, 61 Mo. 24.

If rights bestowed by charter are inconsistent with, or embarrass the power which legislatures cannot part with, then such renunciation by the legislatures is of no avail, and does not bind their successors.—*Sloan v. Pac. R. Co.*, 61 Mo. 24.

A state may, in chartering a corporation, deprive itself of the power to regulate or tax it.—*St. Louis v. Boatmens' I. & T. Co.*, 47 Mo. 150.

[17] — Necessity for consideration for such grant.

Where a legislature makes an irrevocable grant of any essential prerogative of sovereignty, it must be upon consideration, and, in case of corporations, contemporaneous with the creation of the franchise.—*Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140.

[18] — When exemption exists.

A city, having entered into a contract whereby a company was granted the right to furnish water to the inhabitants of that city at a price not to exceed a fixed maximum, cannot, by subsequent ordinances, rightfully violate the contract rights of the company in respect to the amount which the company may lawfully charge.—*Vicksburg v. Vicksburg Water Co.*, 206 U. S. 496, 27 Sup. Ct. R. (U. S.) 762.

A contract between a city and a public service corporation as to rates does not bind the city for the term thereof to permit the specified rates to be charged even though they are no longer reasonable.—*Tampa W. W. v. Tampa*, 199 U. S. 241, 26 Sup. Ct. R. (U. S.) 23.

A city ordinance providing that the rate of fare for one passenger shall not be more than five cents is a contract which gives the company the right to charge a rate of fare up to five cents, and the city can not reduce the five-cent rate established by the company without its consent.—*Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 22 Sup. Ct. R. (U. S.) 410.

The clause of the charter of a railroad corporation providing "that it shall be lawful for the company . . . from time to time to fix,

regulate, and to receive the toll and charges by them to be received for transportation," etc., does not grant to the company an exemption from the power of the state to control fares and freights.—*Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 6 Sup. Ct. R. (U. S.) 334, 388, 1191.

A railroad was authorized by its charter "to demand and receive such sum or sums of money for the transportation of persons and property, and for the storage of property, as it shall deem reasonable." The Constitution of Wisconsin provides that all acts for the creation of corporations within the state "may be altered or repealed by the legislature at any time after their passage."—*Held*, that the legislature had the power to limit the amount of charges for fares and freights.—*Peik v. Ch. & N. W. R. Co.*, 94 U. S. 164, affg. s. c. Fed. Cases, No. 11,138.

The charter received by a street railroad corporation from a city provided that the latter should not reduce fares below five cents. A later contract between the company and city provided that "in the construction, maintenance and operation" of its lines, the company should be subject to the present and future ordinances of the city.—*Held*, that this did not enable the city to reduce fares below five cents.—*Minneapolis St. R. Co. v. City of Minneapolis*, 155 Fed. 989.

The Texas statute of 1853, which authorizes the legislature to fix the rates to be charged by railroads, and provides that no reductions shall be made in the rates of a company unless, during the previous ten years, it shall have earned, above bona fide expenditures, a net profit of 12 per cent. per annum, does not create such a contract between the state and railroads subsequently incorporated thereunder, as to deprive the state of the right to adopt other measures of rate regulation, or exempt the corporations from the provisions of such future legislation.—*Houston & T. C. R. Co. v. Storey*, 149 Fed. 499.

A railroad which has received grants of land and right of way from the government and is declared by various acts of Congress to be a post and military route and national highway for postal, military and other governmental services, is not free from state regulation as to rates.—*St. Louis & S. F. R. Co. v. Gill*, 54 Ark 101, 15 S. W. 18, 11 L. R. A. 452n, affd. on other points, 156 U. S. 649, 15 Sup. Ct. R. (U. S.) 484.

An ordinance fixing the rates of a water company for a period of thirty years did not give the right to charge such rates during that period, as the ordinance was simply a declaration on the part of the village that such rates were reasonable at that time.—*Rogers Park W. Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363.

Although a railroad was incorporated under a law which authorized it to regulate the time and manner in which property should be trans-

ported and the compensation to be paid therefor, the legislature may still regulate rates and service thereon.—*Chicago, I. & L. R. Co. v. R. R. Commission*, 38 Ind. App. 439, 78 N. E. 338.

The charter of the B. & O. Railroad provided that it might, in addition to its main line, construct lateral lines "in any direction whatsoever,"—*Held*, that an act which provides that no tracks for a steam railway shall be laid within certain territory is void as to it, as impairing the obligation of contract.—*Baltimore & O. R. Co. v. Waters*, 105 Md. 396, 66 Atl. 685.

An act fixing the maximum charges to be made by railroads is not unconstitutional as impairing the obligation of contract, where the charter of a railroad merely gives the right to make some charge but does not give the right to make any charge it may see fit.—*Blake v. Winona & St. P. R. Co.*, 19 Minn. 418, affd. 94 U. S. 180.

While the charter of a private corporation is admitted to be a contract which the legislature cannot, without the consent of the corporation, alter in any material respect, the provision of a railroad charter fixing the maximum charge for the transportation of passengers or freight is in legal effect nothing more than a license, which may at any time be changed by legislative enactment.—*Railroad Co. v. Transp. Co.*, 25 W. Va. 324.

[19] — Such grants not favored.

The charter of a railroad does not exempt it from the operation of subsequently adopted constitutional provisions, but an express contract between the state and the company is necessary to accomplish that result.—*Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, 22 Sup. Ct. R. (U. S.) 95.

Exemption from legislative control as to rates can be derived from a corporate charter only by language so clear and unmistakable that it cannot be reasonably construed consistently with the reservation of the power by the state.—*Georgia R. & B. Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. R. (U. S.) 47, affg. s. c. 70 Ga. 694.

The power to limit the amount of charges by railroad companies for transportation is a power of government and if it can be transferred at all, it can only be by words of positive grant, or something which is in law equivalent.—*Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 6 Sup. R. (U. S.) 334, 388, 1191.

Every presumption is that the state has not, in granting a charter to a public service corporation, renounced or restricted its right to regulate the rates and service of such corporation.—*Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607.

[20] — Transferability.

The franchise or contract between the state and a corporation, by which the latter secures certain immunity from the exercise of governmental authority, is personal, and cannot be assigned or transferred unless the state by the same or a subsequent law authorizes such transfer.—*Rochester R. Co. v. Rochester*, 205 U. S. 236, 27 Sup. Ct. R. (U. S.) 469, affg. s. c. 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773.

A corporation cannot receive by transfer from another corporation an exemption from state interference which is inconsistent with its own charter or with the constitution or laws of the state then applicable, even though, under legislative authorization, the exemption is transferred by words which clearly include it.—*Rochester R. Co. v. Rochester*, 205 U. S. 236, 27 Sup. Ct. R. (U. S.) 469, affg. s. c. 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773.

The rule that a special statutory exemption from control as to rates, etc., does not pass to a new corporation succeeding others by consolidation or purchase, in the absence of express direction to that effect in the statute, is applicable where the constituent companies are held and operated by one of them, under legislative authority.—*People's Gas L. & C. Co. v. Chicago*, 194 U. S. 1, 24 Sup. Ct. R. (U. S.) 520, affg. s. c. 114 Fed. 384

A special statutory exemption or privilege, such as immunity from taxation or a right to fix and determine rates of fare, does not accompany the property in its transfer to the purchaser, in the absence of express direction to that effect in the statute.—*St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. R. (U. S.) 484, affg. s. c. 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452n; *Chicago U. Traction Co. v. City of Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

The immunity from taxation which a railroad corporation enjoys does not pass to the purchaser of the property of such corporation, except with the consent of the legislature.—*Wilson v. Gaines*, 103 U. S. 417, affg. s. c. 9 Baxt. (Tenn.) 546.

[21] — Effect of reorganization or consolidation.

A corporation formed by the consolidation of existing corporations is subject to the constitution and laws as existing at the time of consolidation, and exemptions enjoyed by the constituent companies do not continue in favor of the new corporation if the constitution at that time forbids exemptions.—*Yazoo & M. V. R. Co. v. Vicksburg*, 209 U. S. 358, 28 Sup. Ct. R. (U. S.) 510.

While two street railway corporations may be so united by one of them taking over the stock and franchises of the other, that the latter may continue to exist and also to hold an exemption under its fran-

chise, that is not the case where its stock is exchanged for that of the former and by operation of law it is left without stock, officers, property or franchises. Under such circumstances, it is dissolved by operation of the law which brings about this condition.—*Rochester R. Co. v. Rochester*, 205 U. S. 236, 27 Sup. Ct. R. (U. S.) 469, affg. s. c. 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773.

Where, after a new constitution has been adopted, a railway previously incorporated consolidates with other roads or accepts new privileges from the state, all franchises and privileges acquired are taken subject to the provisions of the new constitution.—*San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 26 Sup. Ct. R. (U. S.) 261.

The right of a railroad to charge fare at a specified rate per mile, secured to it by special act, is a privilege or franchise in the nature of property, is alienable, and is not lost by the subsequent consolidation of the road into a general system.—*Parker v. Elmira, C. & N. R. Co.*, 165 N. Y. 274, 59 N. E. 81, affg. s. c. 27 App. Div. (N. Y.) 383, 49 N. Y. Supp. 1127.

A corporation reorganized under the reorganization acts of 1874 and 1876 is an entirely new and different corporation from the original one.—*People ex rel. Schurz v. Cook*, 110 N. Y. 443, 18 N. E. 113.

A railroad corporation which is the successor of one which had the general right to fix its rates, is nevertheless subject to a state statute, passed before the reorganization, requiring the issuance of mileage books at a prescribed price.—*Horton v. Erie R. Co.*, 86 App. Div. (N. Y.) 379, 83 N. Y. Supp. 733, 65 App. Div. (N. Y.) 587, 72 N. Y. Supp. 1018.

[22] Source and extent of state legislative power.

The legislature of a state does not look to the state constitution for power to pass laws regulating public service companies, but only to determine whether the sovereign legislative will has been in any manner restricted or limited by that instrument.—*Platt v. Le Cocq*, 150 Fed. 391.

The question whether an act is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. An act will not be declared void because deemed to be opposed to natural justice and equity.—*Bertholf v. O'Reilly*, 74 N. Y. 509.

An act within the legitimate exercise of legislative power is valid, unless some restriction or limitation is found in the constitution.—*People v. Flagg*, 46 N. Y. 401.

All the legislative power of New York State is vested in the legislature, subject only to express limitations in the New York Constitution.—*People v. Flagg*, 46 N. Y. 401.

The power of the legislature to legislate for the public safety, health, prosperity, morals, etc., is unlimited except as restrained by the explicit provisions of the constitution.—*Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657.

The legislative power of the legislature is unlimited, except as expressly restricted by constitutional provisions. The state constitution is not its source of power.—*Bank of Chenango v. Brown*, 26 N. Y. 467.

Where a duty in respect to a particular thing is enjoined by the Constitution upon the legislative branch of the government, and the mode of doing it is left exclusively to legislative discretion, even though the authority may have been previously exercised by the legislature, no limitation is thereby set to legislative power.—*Grant v. Courter*, 24 Barb. (N. Y.) 232.

[23] Presumption of validity of statutes.

Presumption of validity of legislative determinations as to what is a city purpose,—see post, § 14, note [2].

State statutes not to be construed as applying to interstate commerce,—see post, § 25, note [18].

Validity of statutes forbidding discriminations,—see post, § 31, note [21].

An act of the legislature is presumed to be valid.—*Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. R. (U. S.) 336.

Save in a clear case of legislative error, a court of first instance may well decline to hold a statute unconstitutional.—*Michie v. N. Y. N. H. & H. R. Co.*, 151 Fed. 694.

A statute can be declared unconstitutional only when it can be shown beyond a reasonable doubt that it conflicts with the fundamental law, and until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible, the statute will be upheld.—*People ex rel. Henderson v. Supervisors*, 147 N. Y. 1, 41 N. E. 563, 30 L. R. A. 74.

To be held unconstitutional, a statute must plainly be at war with the fundamental law.—*People ex rel. Sinkler v. Terry*, 108 N. Y. 1, 14 N. E. 815.

The courts will not take proof of facts *aliunde* for the purpose of showing a statute, valid and regular on its face, to be unconstitutional.—*Matter of N. Y. El. R. Co.*, 70 N. Y. 327, 3 Abb. N. C. (N. Y.) 401, affg. s. c. 7 Hun (N. Y.), 401.

The legislative discretion is not to be interfered with judicially by process of inference or implication.—*Matter of Dugro*, 50 N. Y. 513.

If a state act is within the legitimate exercise of the legislative power, it is valid unless some restriction or limitation can be found in the Constitution itself.—*People ex rel. McLean v. Flagg*, 46 N. Y. 401.

It is the exercise of a judicial function of a most delicate nature, to declare an act of the legislature void, and it is not to be expected that courts will assume it unless the case be plainly and clearly in derogation of constitutional limitations; nor is it to be expected that they will be zealous or astute to find grounds to thwart or defeat the legislative will, or resort to subtle or strained constructions to bring a statute into conflict with the organic law. But it is to be expected that they will presume in favor of the constitutionality of a statute, giving a liberal construction to uphold it, and refrain from declaring legislative action void, unless such a conclusion cannot be avoided. Errors or mistakes in legislation are not to be referred to the judiciary for correction, or its aid invoked by men chafing under the restraints of particular statutes, to nullify the legislative power.—*Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657.

A state act as to rates, in general terms, containing nothing to make its provisions applicable to interstate carriage of persons or property, will not be interpreted to have been intended by the legislature to so apply. A conflict between the Constitution and a statute will not be implied.—*Dillon v. Erie R. Co.*, 19 Misc. (N. Y.) 116, 43 N. Y. Supp. 320.

A statute is presumed valid until its invalidity is adjudged by a court of competent jurisdiction.—*Richman v. Consolidated Gas Co.*, 114 App. Div. (N. Y.) 216, 100 N. Y. Supp. 81, *affd.* on other points, 186 N. Y. 209, 78 N. E. 871.

The court should start with the presumption that a law is constitutional, and not declare it unconstitutional unless it should become satisfied, beyond any doubt or hesitation, that it is clearly, plainly and palpably unconstitutional.—*Clarke v. Rochester*, 24 Barb. (N. Y.) 446, *affd.* 28 N. Y. 605.

Courts will uphold statutes unless they are so plainly and palpably in conflict with the Constitution as to leave no doubt or hesitation in the judicial mind of their invalidity.—*Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436n.

While an act of the legislature for the regulation of railroad corporations should never be held unconstitutional except in cases where the conflict with the Constitution is clear, manifest, and irreconcilable by any reasonable construction, yet, when it so conflicts with the

Constitution, courts have no alternative except to declare it invalid, for the obligation of courts to support the Constitution is imperative.—*State v. Gt. Northern R. Co.*, 100 Minn. 445, 111 N. W. 289.

A court will not declare a corporation commission act unconstitutional, unless its unconstitutionality is beyond a reasonable doubt. Every reasonable doubt, and every doubtful construction, must be rendered in favor of constitutionality.—*McGwigan v. Wilmington & W. R. Co.*, 95 N. C. 428.

[24] Burden of proving invalidity of statutes.

Plenary power in the legislature for all purposes of civil government is the rule. In inquiring whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden.—*People ex rel. Wood v. Draper*, 15 N. Y. 532.

[25] Construction of statutes susceptible of two interpretations.

In construing a statute which is susceptible of two constructions, one of which will render it valid and the other void, and both are equally reasonable, courts will adopt the construction which renders the act valid.—*People ex rel. Sinkler v. Terry*, 108 N. Y. 1, 14 N. E. 815.

If a railroad commission act be capable of two constructions, one of which is inconsistent with the Constitution, while the other is not in conflict with that instrument, the latter must prevail.—*International & G. N. R. Co. v. R. R. Commission of Texas*, 14 Tex. Ct. R. 42, 89 S. W. 961.

[26] When courts will pass on question of constitutionality.

Courts, whether of original or appellate jurisdiction, will not inquire into the constitutionality of an act of the legislature until a concrete case arises in which a decision of such a question is unavoidable for the determination of the case itself.—*Demarest v. Mayor*, 147 N. Y. 203, 41 N. E. 405; *People ex rel. Simpson v. Wells*, 99 App. Div. (N. Y.) 364, 91 N. Y. Supp. 219.

[27] Expediency and wisdom of enactments not matters for judicial determination.

The Supreme Court of the United States, in testing the constitutionality of an act of Congress, must confine itself to the power to pass it and may not consider evils which it is supposed will arise from the execution of the law, whether they be real or imaginary.—*The Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. R. (U. S.) 141.

Federal Courts have nothing to do with the policy, wisdom, justice or fairness of a state enactment. Those questions are for the consideration of those to whom the state has entrusted its legislative power and

their determination of them is not subject to review or criticism by federal courts.—*Hunter v. Pittsburgh*, 207 U. S. 161, 28 Sup. Ct. R. (U. S.) 40.

Courts may not inquire whether any given act is wise or unwise, but may intervene only when such act infringes upon vested rights.—*Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. R. (U. S.) 336.

Courts can confine the legislature within constitutional authority, and when the questions are legitimately up, can and do exact a strict compliance with all the requirements of law leading to a forcible taking of the property of the citizen; but beyond this they have no discretion and are themselves bound to observe and enforce legislative provisions, whether they approve them or not. The only effective remedy is with the legislative department of the government.—*Guest v. Brooklyn*, 69 N. Y. 506, affg. s. c. 8 Hun (N. Y.), 97.

A statute should not be held unconstitutional unless its unconstitutionality is beyond a reasonable doubt. Courts do not sit in the review of the discretion of the legislature, or determine upon the expediency, wisdom or propriety of the legislative action in matters within the power of the legislature. Every intendment is in favor of the validity of statutes.—*People ex rel. Bolton v. Albertson*, 55 N. Y. 50.

In determining the constitutionality of an act fixing maximum charges for elevating, receiving, weighing, and discharging grain by elevators, the court must assume that the legislature had evidence before it which created a need for legislative regulation, and the court cannot review the decision of the legislature on that question.—*Matter of Annon*, 50 Hun (N. Y.), 413, 2 N. Y. Supp. 275.

In determining the constitutionality of an act fixing maximum charges for elevating, receiving, weighing and discharging grain by elevators, courts are confined to the single question whether the act in question exceeds the utmost limits of legislative power.—*Matter of Annon*, 50 Hun (N. Y.) 413, 2 N. Y. Supp. 275.

If the statute is one which the legislature had power to enact, appeal for relief must be to the legislature, and not by asking the court to sit in judgment upon its justice or expediency.—*Hockett v. State*, 105 Ind. 250, 5 N. E. 178.

[28] Interpretation governed by legislative intent.

The intention of the legislature constitutes the law, and may be as effectually manifested by what is necessarily implied as by what is expressed, and where there are conflicting manifestations of the legislative will, the last is controlling, even though it rests in necessary implication.—*Great Northern R. Co. v. U. S.*, 155 Fed. 945.

In construing a transportation statute, it is a legitimate inquiry to ascertain the purpose and object of the law, the evil to be remedied, and the wrong to be righted by its passage.—*People v. Wabash, St. L. & P. R. Co.*, 104 Ill. 476.

In construing a transportation regulation statute imposing penalties, the court cannot go beyond the meaning of the words and phraseology used, seeking an intent not certainly implied by them. Where there is a reasonable doubt as to the meaning of the words used in the statute, the court will not construe them so as to impose a penalty, nor will it extend by implication the purpose of the act, so as to cover cases not clearly within its meaning. If, however, the legislative intent is clear, that must prevail.—*Hines v. Wilmington & W. R. Co.*, 95 N. C. 434.

[29] Weight given to legislature's interpretation of its own powers.

In determining what is a city purpose,—see post, § 14, note [2].

In considering questions relating to the constitutional power of the legislature in matters of legislation, the courts give great weight to the legislature's own interpretation of such power, as the same is manifested by its continued and repeated exercise for a long period.—*McCleary v. Babcock*, — Ind. —, 82 N. E. 453; *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313.

[30] Legislative grants construed favorably to the public right.

Construction of transfer statutes,—see post, § 26, notes [59]–[61].

Legislative grants of franchises which are in any way ambiguous are to be construed strictly against the grantee.—*Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. R. (U. S.) 427.

When a franchise is susceptible of either of two constructions that interpretation must be adopted which is most favorable to the state.—*Coosaw Mining Co. v. S. Carolina*, 144 U. S. 550, 12 Sup. Ct. R. (U. S.) 689.

Grants of franchises are to be construed strictly, in favor of the public right.—*Charles R. Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420.

Whenever privileges have been granted by the legislature to a public service corporation, and the grant comes under review in the courts, such privileges are to be construed strictly against the corporation and in favor of the public.—*People ex rel. Third Ave. R. Co. v. Newton*, 112 N. Y. 396, 19 N. E. 831, affg. s. c. 48 Hun (N. Y.), 477, 1 N. Y. Supp. 197.

An act conferring a franchise on a railroad company must be construed favorably to the public, and all reasonable doubts must be resolved against the company.—*Brooklyn & R. B. R. Co. v. L. I. R. Co.*, 72 App. Div. (N. Y.) 496, 76 N. Y. Supp. 777.

— A transfer statute, even though it imposes penalties, should be construed against the company and favorably to the right of the public to receive a transfer.—*O'Reilly v. Brooklyn Heights R. Co.*, 95 App. Div. (N. Y.) 253, 89 N. Y. Supp. 41.

A public service corporation will not be sustained in a claim of exclusive privilege unless such claim is explicitly sustained by the terms of its grant.—*Hudson R. Tel. Co. v. Watervliet T. & R. Co.*, 56 Hun (N. Y.), 67, 9 N. Y. Supp. 177.

In interpreting the charter of a corporation, the sovereignty of the state to regulate, tax or license, will never be reduced by implication.—*St. Louis v. Boatmen's I. & T. Co.*, 47 Mo. 150.

[31] Matters which may be considered in construing statutes.

In clearing up any doubtful point in a regulative statute, the title is of value as an aid to construction, and the consequences to the public will be considered, in order to give it a beneficial construction, but not when the legislative intent is clear.—*Hines v. Wilmington & W. R. Co.*, 95 N. C. 434.

[31a] Construction of statutes declaratory of common law.

When a statute is merely declarative of the common law, it should be construed in accordance with the common law rule.—*Cumberland T. & T. Co. v. Kelly*, 160 Fed. 316.

[32] Purpose of acts regulating railroads.

The purpose of the Interstate Commerce Act is to promote and facilitate commerce, and commission and courts must consider this, in applying it.—*Texas & P. R. Co. v. Interst. Com. Commission*, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666, revg. s. c. 57 Fed. 948, affg. s. c. 52 Fed. 187.

The Interstate Commerce Act was not designed to prevent competition among railroads, but to encourage it.—*Interst. Com. Commission v. Ch. G. W. R. Co.*, 141 Fed. 1003.

The purpose of the Interstate Commerce Act is to promote and facilitate trade and commerce, and it must be so interpreted.—*Interst. Com. Commission v. Ala. Midl. R. Co.*, 74 Fed. 715, affg. s. c. 69 Fed. 227; affd., 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45.

The purpose of the provisions of the N. Y. Railroad Law as to reasonable charges, accommodations, etc., is to secure a reasonable degree of equity in the business of railways, and to require them to afford the use of their facilities to all who may have occasion for their employment, and without any unjust or unreasonable discrimination as to the terms of compensation.—*People ex rel. Ohlen v. N. Y. L. E. & W. R. Co.*, 22 Hun (N. Y.), 533.

[33] Effect of previous holdings and constructions.

If a state statute as construed by its highest court is not in conflict with the U. S. Constitution, the Supreme Court of the United States is bound by that construction.—*People ex rel. N. Y. C. & H. R. R. Co. v. Miller*, 202 U. S. 584, 26 Sup. Ct. R. (U. S.) 714.

The construction placed upon the Interstate Commerce Act by the Interstate Commerce Commission which has long obtained and which has been impliedly sanctioned by the subsequent re-enactments of the statute without alteration, must be treated, when not obviously erroneous, as read into the statute and having binding force on the commission and on the courts. However, the binding force of such construction on the court will be restricted to the precise conditions passed upon and not broadened.—*New York, N. H. & H. R. Co. v. Interst. Com. Commission*, 200 U. S. 361, 26 Sup. Ct. R. (U. S.) 272.

The federal courts cannot review the construction put upon a state statute by the state courts. They can only ascertain whether such statute, as construed by the courts of the state that enacted it, is a violation of rights protected by the federal Constitution.—*Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. R. (U. S.) 214, affg. s. c. 33 Fla. 162, 14 So. 588, 25 L. R. A. 120.

Upon a revision of statutes, when provisions from existing or previous statutes, English or American, are embodied in the new, the known and settled construction of those acts is to be regarded as having been intended to be silently incorporated into the new act, and a different interpretation is not to be given to them without some substantial change of phraseology other than what may have been necessary to abbreviate the form of law.—*McDonald v. Hovey*, 110 U. S. 619, 4 Sup. Ct. R. (U. S.) 142.

When the substantial provisions of a previous statute have been incorporated into a new statute, the construction thereof will not be held changed by such alterations as are merely designed to render the provisions more precise.—*McDonald v. Hovey*, 110 U. S. 619, 4 Sup. Ct. R. (U. S.) 142; *Taylor v. Delancey*, 2 Caines' Cas. (N. Y.) 143; *Moers v. Bunker*, 29 N. H. 421.

The English cases are valuable in defining what constitutes undue preference or prejudice, but their value is greatly limited in cases where

the statute itself defines the offense it declares unlawful.—*Railroad Commission of Ga. v. Clyde Ss. Co.*, 4 Inters. Com. R. 120, 5 I. C. C. R. 324.

The frequent citation of English decisions in cases affecting interstate transportation is with manifest disregard of vast differences in facts, time, extent of country, methods of trade and transportation, and language of statutory provisions.—*Railroad Commission of Ga. v. Clyde Ss. Co.*, 4 Inters. Com. R. 120, 5 I. C. C. R. 324.

The construction of the statutes of this State by its Supreme Court should be followed by a justice sitting at Special Term, rather than that of a foreign tribunal of similar jurisdiction.—*Matter of Interborough-Metropolitan Co.*, 56 Misc. 128.

No principle of comity requires the courts of one state to place the same construction upon an act of Congress, with reference to its effect upon a contract for an interstate shipment, as given to it by the decisions of the Supreme Court of another state in which the contract was made.—*Southern R. Co. v. Harrison*, 119 Ala. 539, 24 So. 552, 43 L. R. A. 385.

The practical construction of statutes by executive and legislative officers is entitled to great weight in determining the judicial interpretation of the same.—*Nye v. Foreman*, 215 Ill. 285, 74 N. E. 140.

The state board of railroad commissioners had construed a "carload" of cordwood, under the Missouri statute, to be ten tons, rather than all the cars could safely or conveniently carry.—*Held*, that where the administrative officers charged with enforcing and applying a law have put upon it an interpretation which has been acted upon by them and by the public long enough to make it a virtual rule of the department, it will not be disturbed unless plainly against the law.—*Ross v. K. C. St. J. & C. B. R. Co.*, 111 Mo. 18, 19 S. W. 541.

[34] Reasonable and practical construction.

The doctrine of practical construction of a statute has no application in case of a statute free from ambiguity and not subject to any reasonable doubt as to the meaning of its provisions.—*People ex rel. W. S. El. Co. v. C. T. & E. S. Co.*, 187 N. Y. 58, 79 N. E. 892.

A reasonable construction of a statute should be adopted in all cases where there is doubt and uncertainty in regard to the intention of the lawmakers.—*Topham v. Interurban St. R. Co.*, 96 App. Div. (N. Y.) 323, 89 N. Y. Supp. 298, revg. s. c. 42 Misc. (N. Y.) 503, 86 N. Y. Supp. 295.

[35] Statutes construed as penal.

Statutes allowing attorneys' fees to successful litigants in actions against carriers penal in nature,—see post, § 40, note [3].

Statutes allowing punitive damages are penal,—see post, § 40, note [4].

A statute declaring certain acts to be unlawful, if done by a common carrier, and allowing a person injured by the doing of any of them treble damages, has for its purpose punishment, not indemnity.—*Langdon v. N. Y. L. E. & W. R. Co.*, 58 Hun (N. Y.), 122, 11 N. Y. Supp. 514, affg. s. c. 9 N. Y. Supp. 245.

A statute regulating telegraph companies, though penal to an offender, is generally beneficial, and should be equitably construed.—*U. S. Tel. Co. v. W. U. Tel. Co.*, 56 Barb. (N. Y.) 46.

A statute regulating common carriers, by prohibiting combinations to prevent continuous shipments, on pain of treble damages, is penal, not remedial, and must be strictly construed.—*Clark v. Am. Exp. Co.*, 130 Iowa, 254, 106 N. W. 642.

A statute providing penalties for "extortion or unjust discrimination" is penal, and hence must be strictly construed.—*Bond v. Wabash, St. L. & P. R. Co.*, 67 Iowa, 712, 25 N. W. 892.

A statute authorizing recovery of a forfeiture from a railroad for its failure to furnish cars, must be construed as highly penal.—*Houston & T. C. R. Co. v. Buchanan*, 15 Tex. Ct. R. 521, 94 S. W. 199; *Texas & P. R. Co. v. Hughes*, 14 Tex. Ct. R. 894, 91 S. W. 567.

A statute regulating the speed of trains and imposing penalties for violations of its provisions is a penal statute which should be construed strictly.—*State v. Wisconsin Cent. R. Co.*, — Wis. —, 113 N. W. 952.

[36] Strict or liberal construction of statutes containing penal provisions.

Proviso clause of statute relative to giving of passes to be strictly construed,—see post, § 33, note [14].

Statutes prescribing penalties for failure to furnish cars to be strictly construed,—see post, § 37, note [14].

Statutes in derogation of the common law, aiming at the safety and convenience of the travelling public and railway employees, are not to be construed so strictly as to defeat the obvious intention of Congress as found in the language actually used according to its true and obvious meaning.—*Johnson v. So. Pac. R. Co.*, 196 U. S. 1, 25 Sup. Ct. R. (U. S.) 158.

The federal Act of 1906 as to safety appliances, employers' liability, etc., is remedial, not penal, and would therefore not only permit, but if necessary to sustain its validity, require, a liberal and favorable construction.—*Kelley v. Gt. Northern R. Co.*, 152 Fed. 211.

The Interstate Commerce Act should be as liberally construed in favor of commerce among the states as its language will permit; but, when complaint is made or relief is sought solely or mainly in the interest of the common carriers engaged in the transportation of such commerce the act complained of or the right asserted should not rest upon doubtful construction, but should clearly appear to have been forbidden or conferred.—*Little Rock & M. R. Co. v. St. L. S. W. R. Co.*, 63 Fed. 775, 26 L. R. A. 192, affg. 59 Fed. 400.

The Interstate Commerce Act should be as liberally construed in favor of commerce among the states as its language will permit.—*Kentucky & I. Bridge Co. v. L. & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289.

The Interstate Commerce Act, being highly remedial in purpose, should be liberally construed.—*In re The Express Companies*, 1 Inters. Com. R. 22, 317, 355, 448, 451, 456, 677, 1 I. C. C. R. 349.

A statute which is penal in its nature should be strictly construed.—*Sprague v. Birdsall*, 2 Cow. (N. Y.) 419; *Schloss v. A. T. & S. F. R. Co.*, 85 Tex. 601, 22 S. W. 1014.

A statute for the public benefit may be equitably and beneficially construed, even though it is penal as to some persons.—*Sickles v. Sharp*, 13 Johns. (N. Y.) 498.

The Nebraska Act providing for a board of transportation and giving such board power to regulate the business of railroads, is remedial in its nature and is not subject to strict construction.—*State v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313, 35 N. W. 118.

The rule requiring the strict construction of a penal statute does not authorize the construing of everything to defeat an action brought under the statute.—*Bartolett v. Achey*, 38 Pa. 273.

A transportation statute which imposes penalties or forfeitures for violation of its provisions must be construed strictly.—*Hall v. Norfolk & W. R. Co.*, 44 W. Va. 36, 28 S. E. 754, 41 L. R. A. 669.

[37] Doubts to be resolved in favor of party of whom penalty is claimed.

Exception in case of transfer statutes,—see ante, note [30].

Where there is a reasonable doubt as to the construction of a statute prescribing a penalty for its violation, the party of whom the penalty is claimed is entitled to the benefit of it.—*Goodspeed v. Ithaca St.*

R. Co., 184 N. Y. 351, 77 N. E. 392, affg. s. c. 88 App. Div. (N. Y.) 147, 84 N. Y. Supp. 383.

In statutes giving a penalty, if there be reasonable doubt of the case made upon the trial or in the pleadings coming within the statute, the party of whom the penalty is claimed is to have the benefit of such doubt.—*Chase v. N. Y. C. R. Co.*, 26 N. Y. 523.

If the language of a penal statute is ambiguous, the construction will be given it which is most to the advantage of the person on whom the penalty is imposed.—*Branch v. W. & W. R. Co.*, 77 N. C. 347.

[38] Effect of subsequent statute covering same subject matter.

Provisions of N. Y. Statutory Construction Law as to re-enactments,
— see N. Y. Statutory Construction Law, § 32.

A statute covering the whole subject-matter of a former one, adding offences, varying the procedure, etc., operates not cumulatively but by way of substitution, and therefore impliedly repeals it. In the absence of any repealing clause, however, it is necessary to the implication of a repeal that the objects of the two statutes should be the same. If they are not both statutes will stand, though they refer to the same subject.—*U. S. v. Claffin*, 97 U. S. 546, affg. s. c. Fed. Cases, No. 14, 799.

A later act covering the whole subject of a prior one, and embracing new provisions plainly showing that it was intended as a substitute, supersedes the prior act, in the sense of embracing all thereof that was intended to be preserved, omitting what was not so intended, and changing what was intended to be changed, and so prevents the two from being regarded as in any respect coexistent or cumulative enactments.—*Great Northern R. Co. v. U. S.*, 155 Fed. 945.

Statute law is not abrogated or annulled by mere re-enactment or repetition, and when, for purposes of enlargement, contraction, or otherwise, a statute is re-enacted or repeated with amendments, the amendatory act is to be regarded as an affirmation and continuation of the prior law, in so far as in substance and operation it is the same, and is to be regarded as new legislation only in so far as in substance or operation it differs from the prior law.—*Great Northern R. Co. v. U. S.*, 155 Fed. 945.

Where a revising statute covers the whole subject-matter of antecedent statutes, the revising statute virtually repeals the former enactments without any express provision to that effect, and even where some parts of the revised statute are omitted in the new law, they are not in general to be regarded as left in operation, but are considered as annulled, if it appear that the legislature intended to cover the

whole subject-matter by the new statute.—*Matter of N. Y. Institution*, 121 N. Y. 234, 24 N. E. 378.

While repeals by implication are not favored, yet where the provisions of the later statute cannot have their full force and effect without the repeal of the former statute, such former statute must be deemed to be repealed by implication, or otherwise the plain intent of the legislature, as evidenced by its latest expression, is prevented from due operation by an inconsistent former statute. In such cases where the provisions are inconsistent, the latter must prevail as the latest exhibition of the will of the law-making power.—*Matter of Wash. St. A. & Pk. R. Co.*, 115 N. Y. 442, 22 N. E. 356, affg. s. c. 52 Hun (N. Y.), 311, 5 N. Y. Supp. 355.

Where a later statute, not purporting to amend a former one upon the same subject, covers that subject, and was plainly intended to furnish the whole law thereon, the former statute will be held to be repealed by necessary implication, although it contains no express clause making such repeal.—*Heckmann v. Pinkey*, 81 N. Y. 211.

Where the law antecedently to a revision was settled, either by clear expressions in the statutes, or adjudications upon them, the mere change in phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change.—*Parmelee v. Thompson*, 7 Hill (N. Y.), 77; *Theriat v. Hart*, 2 Hill (N. Y.), 380; *Goodell v. Jackson*, 20 Johns. (N. Y.) 693; *Yates v. People*, 4 Johns. (N. Y.) 314; revd. on other grounds, 6 Johns. (N. Y.) 335; *Taylor v. Delancy*, 2 Caines' Cas. (N. Y.) 143; *Croswell v. Crane*, 7 Barb. (N. Y.) 191.

[39] Construction of specific provisions.

Such expressions as "liability created by law," "required by law," "regulated by law," "allowed by law," "made by law," "limited by law," "as prescribed by law," "a law of the state," occurring in codes or other legislative enactments are always used as referring to statutory provisions only.—*Brinkerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663.

The words "prescribed by law" in N. Y. Const., Art. V, § 6, providing that the powers and duties of the boards and officers mentioned in that article "shall be such as now are or hereafter may be prescribed by law," means that the officers shall have such powers as are or may be prescribed by some statute of the state.—*People v. Santa Clara Lumber Co.*, 55 Misc. (N. Y.) 507.

[40] Divisibility of statutes.

The act creating the Texas Railroad Commission made rates fixed by it conclusive, and provided an enormous penalty for disregarding them.—*Held*, even if these two provisions are unconstitutional, the

rest of the act remains and will be enforced.—*Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. R. (U. S.) 1047.

The provision of the Constitution of California making the rates fixed by its state railroad commission conclusively just and reasonable is void, but is so clearly separable from the rest of the provisions relating to the commission that it does not render them invalid.—*So. Pac. Co. v. Board of R. R. Comrs.*, 78 Fed. 236.

If a state law were intended to apply to both state and interstate transportation, and was invalid as to the latter, it would nevertheless be valid and operative as to the former.—*Dillon v. Erie R. Co.*, 19 Misc. (N. Y.) 116, 43 N. Y. Supp. 320.

Where a part of a statute is unconstitutional, the remainder will not be declared unconstitutional also, if the two are distinct and separable, so that the latter may stand, though the former becomes of no effect.—*Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141.

"In my opinion while this part of the act [referring to so much of Pub. Serv. Com. L., § 14, as relates to the application to the Appellate Division of the Supreme Court] is of doubtful validity, it is not necessary at this time to pass upon the question of its constitutionality. If the statute is otherwise good, this part, if bad, can be eliminated without destroying the entire fabric of the act."—*Opinion of Corporation Counsel F. K. Pendleton*, rendered to Comptroller H. A. Metz, July 13, 1907.

[41] Classification by a state for purposes of regulation.

The power of the state to classify persons and property in its legislation is well established.—*Thompson v. Kentucky*, 209 U. S. 340, 28 Sup. Ct. R. (U. S.) 533.

There is no arbitrary classification in a state statute which requires the production of books and papers by corporations upon notice. Such statute was passed to require the corporation as the responsible owner and custodian of the books and papers to produce the same without the necessity of calling upon bookkeepers, managers and other servants who may or may not have custody or control thereof at the time the notice is given.—*Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. R. (U. S.) 178, affg. s. c. — Vt. —, 66 Atl. 790.

A statute which puts in one class all engaged in a business of a special and public character, requires of them the performance of a duty which they can do better and more quickly than others, and imposes a not exorbitant penalty for a failure to perform that duty within a reasonable time, can not be adjudged unconstitutional as a purely arbitrary classification.—*Seaboard Air L. Co. v. Seegers*, 207 U. S. 73, 28 Sup. Ct. R. (U. S.) 28, affg. s. c. 73 S. C. 71, 52 S. E. 797.

A state has power through its legislature to classify objects for the purpose of government, but in exercising that power the classification must have relation to the purpose of the legislature, but logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be merely arbitrary, but there must be great freedom of discretion, even though it result in ill advised, unequal and oppressive legislation.—*Heath & Milligan Co. v. Worst*, 207 U. S. 338, 28 Sup. Ct. R. (U. S.) 114.

In a general classification for governmental purposes, there cannot be an exact exclusion or inclusion of persons and things and such a classification ought not to be rendered invalid so long as there is no substantial and fair ground to say that it is an unreasonable and unfounded classification.—*Ozan Lumber Co. v. Union Co. Bank*, 207 U. S. 251, 28 Sup. Ct. R. (U. S.) 89, revg. s. c. 145 Fed. 344.

Legislation may be directed against a class, when any fair ground for the discrimination exists.—*Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 24 Sup. Ct. R. (U. S.) 638.

While a state has the right to classify for regulation, such classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted and no mere arbitrary selection can ever be justified by calling it classification.—*Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. R. (U. S.) 609.

§ 2. Definitions.—[a.]* The term “commission,” when used in this act, means either public service commission, hereby created, which by the terms of this act is vested with the power or duty in question.

[b.]* The term “commissioner,” when used in this act, means one of the members of such commission.

[c.]* The term “corporation,” when used in this act, includes a corporation, company, association and joint-stock association.

[d.]* The word “person,” when used in this act, includes an individual and a firm or copartnership.

[e.]* The term “street railroad,” when used in this act, includes every railroad by whatsoever power operated, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons or property for compensation, being mainly upon, along, above or below any street, avenue, road, highway, bridge or public place in any city, village or town, and including

* Arbitrary paragraph designation not in original Act.—Ed.

all switches, spurs, tracks, right of trackage, subways, tunnels, stations, terminals and terminal facilities of every kind used, operated, controlled or owned by or in connection with any such street railroad; but the said term "street railroad," when used in this act, shall not include a railroad constituting or used as part of a trunk line railroad system.

[f.]* The term "railroad," when used in this act, includes every railroad, other than a street railroad, by whatsoever power operated for the public use in the conveyance of persons or property for compensation, with all bridges, ferries, tunnels, switches, spurs, tracks, stations and terminal facilities of every kind used, operated, controlled or owned by or in connection with any such railroad.

[g.]* The term "street railroad corporation," when used in this act, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, operating, owning, managing or controlling any street railroad or any cars or other equipment used thereon or in connection therewith.

[h.]* The term "railroad corporation," when used in this act, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, managing or controlling any railroad or any cars or other equipment used thereon or in connection therewith.

[i.]* The term "common carrier," when used in this act, includes all railroad corporations, street railroad corporations, express companies, car companies, sleeping-car companies, freight companies, freight-line companies and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this state.

[j.]* The term "gas corporation," when used in this act, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, managing or controlling any plant or property for manufacturing and distributing and selling for distribution or distributing illuminating gas (natural or manufactured) for light, heat or power.

[k.]* The term "electrical corporation," when used in this act, includes every corporation, company, association, joint-stock asso-

* Arbitrary paragraph designation not in original Act.—Ed.

ciation, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever (other than a railroad or street railroad corporation generating electricity for its own use exclusively), owning, operating, managing or controlling any plant or property for generating and distributing, or generating and selling for distribution, or distributing electricity for light, heat or power or for the transmission of electric current for such purposes.

[l.]* The term "transportation of property or freight," when used in this act, includes any service in connection with the receiving, delivery, elevation, transfer in transit, ventilation, refrigeration, icing, storage and handling of the property or freight transported.

[m.]* The term "municipality," when used in this act, includes a city, village, town or lighting district, organized as provided by a general or special act.

Definitions under Interstate Commerce Act,—see Inters. Com. Act, § 1, post, Appendix B.

Definitions under Gas & Electricity Commission Act,—see N. Y. Gas & El. Com. Act, § 2.

Nothing in this act is deemed to apply to or operate upon interstate or foreign commerce,—see post, § 86.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

[1] Classification of railroads for purposes of regulation.

When roads are classified for regulation, the justice or injustice of the regulation must be determined by the effect on the class and not on a particular member of it.—*St. Louis & S. F. R. Co. v. Gill*, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452n; *affd.* 156 U. S. 649, 15 Sup. Ct. R. (U. S.) 484.

[2] What constitutes a common carrier—In general.

Extent to which carrier holds itself out as such as affecting its duty toward the public,—see post, § 26, note [12].

A corporation is a common carrier to the extent it holds itself out to be such.—*Citizens' Bank v. Nantucket S. Co.*, 2 Story (U. S.), 16.

A common carrier is one who offers to carry goods for any person between certain termini, or on a certain route, and who is bound to carry for all who tender him goods, at the price of carriage.—*The Neaffie*, 1 Abb. (U. S.) 465, Fed. Cas. No. 10,063.

* Arbitrary paragraph designation not in original Act.—Ed.

A common carrier is one who makes it a business to transport goods, either by land or water, for hire, and holds himself ready to carry them for all persons who apply and pay the hire.—*The Huntress*, 2 Ware (U. S.), 82, Fed. Cas. No. 6914.

That a carrier does other business than the transportation of passengers or property, or performs a further service than that of carriage in respect to freight transported, does not make it any less a common carrier, within the operation of the Interstate Commerce Act.—*In re The Express Companies*, 1 Inters. Com. R. 22, 317, 355, 448, 451, 456, 1 I. C. C. R. 349.

A common carrier is one who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another, for all such as may choose to employ him.—*Jackson A. Iron Works v. Hurlbut*, 158 N. Y. 34, 52 N. E. 665, affg. s. c. 15 Misc. (N. Y.) 93, 36 N. Y. Supp. 808; *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, affg. s. c. 68 Hun (N. Y.), 486, 22 N. Y. Supp. 976; *Allen v. Sackrider*, 37 N. Y. 341; *Bank of Orange v. Brown*, 3 Wend. (N. Y.) 158.

An express company received at its office packages of coin, bullion, bank notes, commercial paper and such other articles of value as parties thought fit to intrust to the care of the company, for the purpose of being transported.—*Held*, that such company was a common carrier as to the articles mentioned.—*Sherman v. Wells*, 28 Barb. (N. Y.) 403.

A common carrier is one who undertakes as a public employment the transportation of goods for persons generally from place to place, to be delivered at the place appointed, for hire or reward, and with or without a special agreement as to price.—*Carpenter v. B. & O. R. Co.*, — Pen. (Del.) —, 64 Atl. 252.

The term "common carrier" did not, at common law, embrace a carrier of passengers.—*Central of Ga. R. Co. v. Lippman*, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673.

In transporting express matter under a special contract with an express company, a railroad is a private carrier of goods, and is not acting as a common carrier.—*Louisville, N. A. & C. R. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93.

To constitute a common carrier, the person or corporation need not own the means of transportation.—*Cownie Glove Co. v. Merchants' Dispatch T. Co.*, 130 Iowa, 327, 106 N. W. 749.

By entering into a special contract to furnish cars for carrying milk, a railroad becomes a common carrier of milk.—*Baker v. Boston & M. R. Co.*, — N. H.—, 65 Atl. 386.

[3] — Express companies.

The Interstate Commerce Act does not apply to express companies which carry on their business in the ordinary manner and do not operate railway lines.—*Southern Ind. Exp. Co. v. U. S. Exp. Co.*, 88 Fed. 659; *affd.* 92 Fed. 1022.

Express companies, independently organized for the transaction of the express business on their own account, are not subject to the Interstate Commerce Act.—*U. S. v. Norsman*, 42 Fed. 448.

Express business done as a branch of railroad business is under the jurisdiction of the Interstate Commerce Act, but express companies existing as separate organizations are not.—*In re The Express Companies*, 1 Inters. Com. R. 22, 317, 355, 448, 451, 456, 1 I. C. C. R. 349.

An express company is a common carrier.—*Belger v. Dinsmore*, 51 N. Y. 166, *revg. s. c.* 51 Barb. (N. Y.) 69, 34 How. Pr. (N. Y.) 421; *Sherman v. Wells*, 28 Barb. (N. Y.) 403; *Haslam v. Adams Exp. Co.*, 6 Bosw. (N. Y.) 235; *Buckland v. Adams Exp. Co.*, 97 Mass. 124; *Christenson v. Am. Exp. Co.*, 15 Minn. 270; *U. S. Exp. Co. v. Backman*, 28 Oh. St. 144.

An act making express companies common carriers and regulating them as such, is valid.—*Adams Exp. Co. v. State*, 161 Ind. 328, 67 N. E. 1033.

[4] — Sleeping-car companies.

A sleeping car company is not a common carrier.—*Calhoun v. Pullman Palace Car Co.*, 149 Fed. 546; *Lemon v. Pullman Car Co.*, 52 Fed. 262; *Blum v. So. Pullman Car Co.*, Fed. Cas. No. 1574.

Sleeping car companies are neither innkeepers nor common carriers, and the rules of the common law as to carriers have not been extended to them.—*Adams v. N. J. S. Co.*, 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, *affg. s. c.* 9 Misc. (N. Y.) 25, 29 N. Y. Supp. 56; *Carpenter v. N. Y. N. H. & H. R. Co.*, 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759; *Ulrich v. N. Y. C. & H. R. R. Co.*, 108 N. Y. 80, 15 N. E. 60; *Williams v. Webb*, 27 Misc. (N. Y.) 508, 58 N. Y. Supp. 300, *modifg. s. c.* 22 Misc. (N. Y.) 513, 49 N. Y. Supp. 1111; *Pullman Pal. C. Co. v. Smith*, 73 Ill. 360; *Woodruff S. & P. Co. v. Diehl*, 84 Ind. 474; *Lewis v. N. Y. S. C. Co.*, 143 Mass. 267, 9 N. E. 615.

[5] — Street railway companies.

The Interstate Commerce Act applies not only to the steam railways by which interstate traffic is mainly conducted, but also to the electric street surface roads for suburban and interurban travel.—*Willson v. Rock Creek R. Co.*, 7 Inters. Com. R. 83.

A street railway company is a common carrier.—*State v. Spokane St. R. Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 410.

[6] — Corporations maintaining railway tracks for special purposes.

A provision in the Constitution of Louisiana that all railroads are public highways, and all railroad corporations are common carriers, does not make a business corporation, organized to do a lumber and logging business and to "maintain and operate a railroad, tramways, and other devices necessary for the purpose of said business," a common carrier, charged with the duties imposed by law on such carriers, with respect to a logging railroad built by it on its grounds and operated by it in connection with the mill.—*Wade v. Litcher Lumber Co.*, 74 Fed. 517, 33 L. R. A. 255.

A bridge company, owning and operating a bridge, and owning tracks across such bridge and extending to terminals in the cities of Louisville and New Albany, over which a railroad company runs its trains, but not owning or operating freight cars of its own, and which collects bridge toll and switching charges from those using its facilities, is not a common carrier of freight within the meaning of Interst. Com. Act, § 1.—*Kentucky & I. Bridge Co. v. L. & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289.

A stock-yards company had, under its charter, the option of becoming a common carrier, and did become such as to dead freight, but not as to live-stock. It imposed a trackage charge on railroads which used its tracks for transporting live-stock, and such transporting was done entirely by the railroads.—*Held*, that it was not a common carrier engaged in the transportation of live-stock, within Interst. Com. Act, § 1, and was not subject to regulation by the Interstate Commerce Commission in that capacity.—*Cattle Raisers' Assn. v. Fort Worth & D. C. R. Co.*, 7 Interst. Com. R. 513.

A railroad which takes cars from a connecting road, and by means of a switch-engine transports such cars a short distance over a portion of its own track to a spur of its own, is a common carrier.—*Missouri Pac. R. Co. v. Grocery Co.*, 55 Kan. 525, 40 Pac. 899.

[7] — The receiver of a railway corporation.

Effect of receivership on regulative power of state,—see post, note [15].

The receiver of a railroad in the custody of a court is a common carrier.—*Beers v. Wabash, St. L. & P. R. Co.*, 34 Fed. 244.

Receivers of railroads are common carriers subject to the prohibitions and requirements of, and to regulation under, the provisions of the Interstate Commerce Act.—*Evans v. U. Pac. R. Co.*, 6 Interst. Com. R. 520.

[8] What constitutes a railroad or street railroad.

A manufacturing company maintaining in its yards a number of tracks and a switch engine is not "a railroad corporation operating a railroad or a part of a railroad," within the meaning of 93 Ohio Laws, p. 342, requiring such railroad corporations to block their frogs.—*Taggart v. Republic I. & S. Co.*, 141 Fed. 910.

There is a clear distinction between "railroad" and a "line." Two carriers may use the same "road," but each has its separate "line."—*Interst. Com. Commission v. C. N. O. & T. P. R. Co.*, 56 Fed. 925.

Pneumatic tubes for the transmission of parcels, etc., below ground, by atmospheric pressure, are in no sense railways.—*Astor v. Arcade R. Co.*, 113 N. Y. 93, 20 N. E. 594, 2 L. R. A. 789n, affg. s. c. 48 Hun (N. Y.), 562, 1 N. Y. Supp. 174.

A proposed road along Niagara Falls and the Whirlpool Rapids is not a railroad, within the meaning of the law authorizing railroads to acquire lands by condemnation.—*Matter of Niag. Falls & Whirlpool R. Co.*, 108 N. Y. 375, 15 N. E. 429, affg. s. c. 46 Hun (N. Y.), 94.

A subway operated beneath the surface of streets is a "street railway."—*Matter of N. Y. District R. Co.*, 107 N. Y. 42, 14 N. E. 187, affg. s. c. 42 Hun (N. Y.), 621.

Kinetic stored steam power is not "a locomotive steam power."—*People ex rel. Babylon R. Co. v. Board of R. R. Comrs.*, 32 App. Div. (N. Y.) 179, 52 N. Y. Supp. 908; affd., 158 N. Y. 711, 53 N. E. 1129.

A spur running half a mile from a company's main line to a race-track, and used only when races were being held, is not a railroad, within the meaning of the three-cent maximum fare statute.—*Palm v. N. Y. N. H. & H. R. Co.*, 17 N. Y. Supp. 471.

It cannot be said as a matter of law that merely because a commercial steam railroad will be only about three miles in length, it will be no railroad at all.—*Bridwell v. Gate City Terminal Co.*, 127 Ga. 520, 56 S. E. 624.

A company incorporated for the purpose of building and operating a railroad three miles in length for the carrying of goods and passengers cannot be said to be no railroad company at all merely because it selects the name of "Terminal Company."—*Bridwell v. Gate City Terminal Co.*, 127 Ga. 520, 56 S. E. 624.

The fundamental purpose of a street railway is to accommodate street travel and not travel to or from points beyond the city's lines.—*City of Aurora v. Elgin Trac. Co.*, 227 Ill. 485, 81 N. E. 544.

It is the mode of construction and chartered use, and not the motive power, which determines the character of a railroad.—*McCleary v. Babcock*, — Ind. —, 82 N. E. 453.

The term "railroad," as employed in our general legislation, relates to institutions of a quasi-public character, to highways or roads constructed by the authority of the state, with fixed metallic rails upon which public carriers may propel their carriages, or cars, speedily in the transportation of passengers and freights. Any way or road having these characteristics is a railroad.—*McCleary v. Babcock*, — Ind. —, 82 N. E. 453.

[9] Various public services within the scope of the act defined.

Elevation of grain not interstate commerce,—see post, § 25 note [5].

The business of elevating and storing grain is a public service.—*Brass v. Stoesser*, 153 U. S. 391, 14 Sup. Ct. R. (U. S.) 857; *Munn v. Illinois*, 94 U. S. 113, affg. s. c. 69 Ill. 80.

The "transportation" of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself.—*Reading R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 232.

"Transporting, receiving, delivering, storage, or handling" of property includes demurrage.—*Michie v. N. Y. N. H. & H. R. Co.*, 151 Fed. 694.

The words "transportation," "charges," "receiving," and "accessorial services," as used in the Interstate Commerce Act, defined and applied.—*Detroit, G. H. & M. R. Co. v. Interst. Com. Commission*, 74 Fed. 803, affg. s. c. 57 Fed. 1005; affd., 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986.

"Elevation" signifies the unloading of grain from cars, or from grain-carrying vessels, into a grain elevator, and loading it out again after a period of not to exceed ten days.—*Allowances to Elevators by U. Pac. R. Co.*, 12 Inters. Com. R. 99.

The "treatment," or grading, cleaning, and clipping, of grain, is not properly a part of "elevation," as the word is strictly used.—*Allowances to Elevators by U. Pac. R. Co.*, 12 Inters. Com. R. 99.

The retention of grain in an elevator longer than ten days is storage, not elevation.—*Allowances to Elevators by U. Pac. R. Co.*, 12 Inters. Com. R. 99.

The Interstate Commerce Act does not apply to "transportation" by team or wagon, nor an arrangement entered into by a railroad for transportation of its freight or passengers by wagon.—*Cory v. Eureka Springs R. Co.*, 7 Inters. Com. R. 286.

An electric lighting corporation which uses the public streets, etc., is a public service corporation.—*Armour Packing Co. v. Edison E. L. Co.*, 115 App. Div. (N. Y.) 51, 100 N. Y. Supp. 605.

"Switching" or "transfer service" occurs only in connection with a "transportation" of the freight over a railway, and where the entire

service is rendered on spur-tracks of a railroad company it is "transportation" and not "switching," for which transportation and not switching charges may be made.—*Dixon v. Central of Ga. R. Co.*, 110 Ga. 173, 35 S. E. 369.

[10] Depots and stations defined.

The word "depot" is not necessarily limited to a place provided for the convenience of passengers while waiting for the arrival or departure of trains. It applies also to buildings used for the receipt and storage of freight.—*Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. R. (U. S.) 779.

The place where a railroad corporation is accustomed to receive, deposit and keep ready for transportation or delivery the merchandise carried by it is a "depot," within the general signification of the word.—*Maghee v. Camden & A. R. Co.*, 45 N. Y. 514.

The words "depot or station" in the law mean a place at which trains stop, not merely for wood and water, but for the transaction of the ordinary business of the company, the receiving of and delivering of freight and passengers.—*State v. New Haven & N. Co.*, 37 Conn. 153.

A "regular depot" or "station" is a fixed place on the line of the carrier, equipped with suitable buildings and furnished with the necessary officers and servants for the regular transaction of business, for the receipt and delivery of freight, and the comfort and convenience of passengers.—*Land v. Wilmington & W. R. Co.*, 104 N. C. 48, 10 S. E. 80.

The term "warehouses and depots" includes the entire station of the road, including the platforms for handling cotton, etc.—*Hill & M. v. St. Louis S. W. R. Co.*, 7 Tex. Ct. R. 336, 812, 75 S. W. 874.

[11] Corporations as persons.

The word "person" or "persons," used in a regulative statute as to public services, includes corporations.—*Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. R. (U. S.) 418, affg. s. c. 64 Fed. 165; *Covington & L. Turnpike Co. v. Sanford*, 164 U. S. 578, 17 Sup. Ct. R. (U. S.) 198, revg. s. c. 14 Ky. L. R. 689, 20 S. W. 1031; *Charlotte R. Co. v. Gibbs*, 142 U. S. 386, 12 Sup. Ct. R. (U. S.) 255, affg. s. c. 27 S. C. 385, 4 S. E. 49; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. R. (U. S.) 207; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. R. (U. S.) 737; *Santa Clara Co. v. So. Pac. R. Co.*, 118 U. S. 394, 6 Sup. Ct. R. (U. S.) 1132; *People v. Mulholland*, 82 N. Y. 324, affg. s. c. 19 Hun (N. Y.), 548; *U. S. Tel. Co. v. W. U. Tel. Co.*, 56 Barb. (N. Y.) 46.

[12] Effect of various forms of ownership and control upon power of state to regulate — In general.

Orders of Commission binding on successors of companies affected,— see post, § 23, note [3].

Liability of trustees conducting railroad,— see post, § 40, note [1].

The law will strip a corporation of every disguise, and enforce a responsibility according to the very right, in despite of their artifices.—*York & Md. R. Co. v. Winans*, 17 How (U. S.) 30.

The manifest purpose of the statutes regulating interstate commerce is, as was said by the Interstate Commerce Commission in 10 Inters. Com. R. 385, to strike through all pretense, all ingenious device, to the substance of the transaction itself and the courts will recognize and give effect to such purpose.—*U. S. v. Milwaukee Refrig. Transit Co.*, 142 Fed. 247, 145 Fed. 1007, 147 Fed. 169.

While a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association of persons. Hence, where the transit company was organized and is owned by the officers and stockholders of another corporation, viz., the shipper, the latter will be considered as an association of individuals owning the former.—*U. S. v. Milwaukee Refrig. Transit Co.*, 142 Fed. 247, 145 Fed. 1007, 147 Fed. 169.

[13] — Ownership of controlling amounts of stock.

Ownership of controlling amounts of the stock of a railroad and power to change the management, does not give present control of the corporate property and business.—*Pullman Palace Car Co. v. Mo. Pac. Co.*, 115 U. S. 587, 6 Sup. Ct. R. 194.

“Operation or control” of a railroad, under N. Y. R. R. L., § 101, necessarily means the control of the operation of the road, and not merely a control of the corporation or individuals who operate it. A person or corporation owning a majority of stock in a corporation cannot be said to be in control of the management of the property of the corporation. “Control” means the direct operation or control of the specific railroad, and not the indirect control over a corporation which owns a road, by its stockholders.—*Senior v. N. Y. City R. Co.*, 111 App. Div. 39, 97 N. Y. Supp. 645; *affd.* 187 N. Y. 559, 80 N. E. 1120.

[14] — Leasing of operating rights.

Liability of lessor of a railroad for failure to see to it that lessee performs its public duties,— see post, § 40, note [1].

Power of railroads to lease or consolidate,— see post, § 54, note [4].

Powers, duties and obligations of carriers as affected by lease,— see post, § 54, note [5].

A railroad corporation of one state, by leasing and operating a railroad in another state, subjects itself to such local legislation in the latter state as would have been applicable to the corporation owning the road, if no lease had been made.—*Stone v. Ill. Cent. R. Co.*, 116 U. S. 347, 6 Sup. Ct. R. (U. S.) 348, 388, 1191.

Where a corporation formed under the General Railroad Law has leased its lines without legislative authority, the lessees are, as to the public, to be regarded as the agents of the corporation, which is responsible to the public for the manner in which the road is operated.—*Abbott v. Johnstown, G. & K. H. R. Co.*, 80 N. Y. 27; distinguishing *Norton v. Wiswall*, 26 Barb. (N. Y.) 618.

The lessee of a railroad is liable for its non-compliance with a statutory requirement as to fence-guards.—*Tracy v. Troy & B. R. Co.*, 83 N. Y. 433, affg. s. c. 55 Barb. (N. Y.) 529.

The Seaboard Air Line R. Co., controlled the Florida West Shore Ry. Co., under a contract which gave the former "right, license or permission to operate" the latter, etc.—*Held*, that this brought the former within the regulative power of the state commission.—*State v. Seaboard Air Line R. Co.*, 48 Fla. 129, 37 So. 314, affd. 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109.

The company owning a railroad is responsible for the acts of its lessees.—*Nelson v. Vermont & C. R. Co.*, 26 Vt. 717.

[15] — Receiverships.

Receiver of railroad a common carrier,—see ante, note [7].

Effect of receivership on proceedings before Commission,—see post, § 48, note [6].

Receivers not liable to penalties,—see post, § 56, note.

Effect of receivership on enforcement of orders of Commission,—see post, § 57, note [15].

Jurisdiction of the U. S. Circuit Court to appoint a receiver in cases of railroads engaged in interstate commerce exists by reason of diversity of citizenship of the parties to the litigation and not because the railroads are engaged in interstate commerce.—*Re Metropolitan Railway Receivership*, 208 U. S. 90, 28 Sup. Ct. R. (U. S.) 219.

A receiver appointed by a federal court to take charge of a railroad must operate it according to the laws of the state in which he is operating it.—*Erb v. Morasch*, 177 U. S. 584, 20 Sup. Ct. R. (U. S.) 819.

The maintenance and use of the property and franchise of a railroad in the hands of a receiver with a view to the public convenience is proper.—*Miltenberger v. Logansport, C. & S. W. R. Co.*, 106 U. S. 286, 1 Sup. Ct. R. (U. S.) 140.

The public have rights in a railroad with which a creditor or mortgagee cannot interfere. A court of equity ought in most cases to authorize a receiver of railroad property to keep it in repair and operate it so that the public may not suffer from a disuse of the franchise.—*Barton v. Barbour*, 104 U. S. 126.

Reorganization of a street railway system in hands of receivers discussed.—*Merchants' L. & T. Co. v. Chicago Rys. Co.*, 158 Fed. 923.

Power of a court to transfer the property of a street railway company in the hands of receivers to a reorganization company by lease, operating agreement or otherwise.—*Guaranty Trust Co. v. Chicago N. Traction Co.*, 158 Fed. 913.

The functions of the receivers of a street railway corporation are to hold the property intact, operating it as efficiently for the public service as their resources will permit, to ascertain the liabilities, marshal the assets, and eventually, unless in the meantime some entirely solvent concern able to liquidate all obligations and succeeding to owners' and lessee's interests shall appear to take it off their hands, to sell it to the best advantage and apply the proceeds ratably to the payment of the liabilities.—*Pennsylvania Steel Co. v. N. Y. City R. Co.*, 157 Fed. 440.

The receivers of a street railroad company, in operating the property of such road, must first consider the traveling public. The service already performed by the roads must be kept up and improved so far as may be. Directions of the Public Service Commission should be carried out by the receivers so far as the income from operating the roads will permit. The receipts should be devoted first to maintenance and to operation. Next are certain fixed charges such as rentals, interest on bonds, etc.—*Pennsylvania Steel Co. v. N. Y. City R. Co.*, 157 Fed. 440.

The assumption of the control of a railroad by a court through a receiver devolves upon that court a duty to the public in the continued operation of the road.—*Townsend v. Oneonta, C. & R. S. R. Co.*, 88 App. Div. (N. Y.) 208, 84 N. Y. Sup. 427.

A receiver of a ferry company will not be allowed to discontinue the operation of a ferry so as to inconvenience the public although the ferry is being operated at a loss.—*Knickerbocker Trust Company v. Brooklyn Ferry Co.*, — Misc. (N. Y.) —, — N. Y. Sup. —.

The mere fact that the property of a railroad corporation may be in the hands of a receiver does not relieve the corporation from the operation of reasonable police regulations.—*Ohio & M. R. Co. v. Russell*, 115 Ill. 52, 3 N. E. 561.

The effect of the appointment of a receiver for a railroad corporation is simply to give him the temporary management of the railroad, under the direction of the court, instead of the manager appointed

by the directors of the corporation.—*Ohio & M. R. Co. v. Russell*, 115 Ill. 52, 3 N. E. 561.

A receiver may be compelled by mandamus to construct a crossing which the railroad company of which he is receiver was under the duty to construct.—*City of Fort Dodge v. Minneapolis & St. L. R. Co.*, 87 Iowa, 389, 54 N. W. 243.

[16] — Ownership of a railroad by a foreign corporation.

A foreign corporation which purchases and operates a railroad within a state must operate the road according to the terms and conditions imposed upon domestic corporations.—*St. Louis & S. F. R. Co. v. Gill*, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452n, affd. on other points, 156 U. S. 649, 15 Sup. Ct. R. (U. S.) 484.

§ 3. Public service districts.—There are hereby created two public service districts, to be known as the first district and the second district. The first district shall include the counties of New York, Kings, Queens and Richmond. The second district shall include all other counties of the state.

Territorial jurisdiction of former Board of Rapid Transit Railroad Commissioners,—see N. Y. Rap. Tr. Act, § 1, post Appendix A. *General rules of statutory construction*,—see ante, § 1, notes [23]–[40].

Power of the legislature to create new civil divisions for regulative purposes.

It is within the power of a state legislature to create special taxing districts and to charge the cost of a local improvement, in whole or in part, upon the property of said district.—*Cleveland, C. C. & St. L. R. Co. v. Porter*, 210 U. S. 177, 28 Sup. Ct. R. (U. S.) 647, affg. s. c. 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179.

The constitution of California divided the state into three districts, “in each of which one railroad commissioner shall be elected.”—*Held*, that this was a valid provision.—*Southern Pac. Co. v. Board of R. R. Comrs.*, 78 Fed. 236.

The act professing to establish a new civil division of the state under the name of the Rensselaer Police District, is unconstitutional, as a colorable and evasive attempt to interfere with local self-government. An existing civil division would be entirely adequate, and as

long as that is the case, the legislature has not power to create a new one.—*People ex rel. Bolton v. Albertson*, 55 N. Y. 50.

An act constituting the four counties of New York, Kings, Westchester and Richmond, the "Metropolitan Sanitary District of New York," and placing health regulations in such district under the control of a board of commissioners appointed by the Governor and Senate, is constitutional. The legislature has power to create new civil divisions of the state, embracing more than one county, not impairing, however, the county organizations.—*Metropolitan Board of Health v. Heister*, 37 N. Y. 661.

It is within the constitutional authority of the state to establish new civil divisions thereof, embracing several towns, cities and counties.—*People v. Shepard*, 36 N. Y. 285.

The Act of 1865 creating a Capital Police District, embracing portions of the counties of Albany and Rensselaer, and the Act of 1866, amending that act by including part of Schenectady county, are constitutional.—*People v. Shepard*, 36 N. Y. 285.

The act creating the Metropolitan Excise District and a Metropolitan Board of Excise having regulation of the liquor traffic in such district, is constitutional.—*Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657.

The act creating a Metropolitan Fire District, and putting the fire department therein under the control of a Board of Metropolitan Fire Commissioners created by the act, is valid.—*People v. Pickney*, 32 N. Y. 377.

Although general statutes must be enacted by the legislature, the power to make regulations which shall have the force of law in limited localities, may be committed to bodies representing the people of those local divisions.—*Clarke v. City of Rochester*, 28 N. Y. 605, affg. 24 Barb. (N. Y.) 446.

The legislature may constitutionally create new civil divisions, embracing the whole or parts of various counties, providing the divisions recognized by the Constitution are not abolished or their capacity impaired.—*People ex rel. Wood v. Draper*, 15 N. Y. 532, affg. s. c. 25 Barb. (N. Y.) 344.

The legislature may create special districts for special purposes.—*People v. Mayor of Brooklyn*, 4 N. Y. 419, revg. s. c. 9 Barb. (N. Y.) 535.

Local taxation for a given purpose need not be limited by or co-extensive with any previously established district.—*People v. Mayor of Brooklyn*, 4 N. Y. 419, revg. s. c. 5 Barb. (N. Y.) 535.

§ 4. Commissions established; appointment; removal; terms of office; **[all necessary powers conferred]*.—There shall be a public service commission for each district, and each commission shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry out the purposes of this act. The commission of the first district shall consist of five members and the commission of the second district shall consist of five members, to be appointed by the governor, by and with the advice and consent of the senate, one of whom designated by the governor shall, during his term of office, be the chairman of the commission of which he is a member. Each commissioner shall be a resident of the district for which he is appointed.

The governor may remove any commissioner for inefficiency, neglect of duty or misconduct in office, giving to him a copy of the charges against him, and an opportunity of being publicly heard in person or by counsel in his own defense, upon not less than ten days' notice. If such commissioner shall be removed the governor shall file in the office of the secretary of state a complete statement of all charges made against such commissioner, and his findings thereon, together with a complete record of the proceedings.

Of the members of the commission in each district first appointed hereunder, one shall hold office until February first, nineteen hundred and nine, one until February first, nineteen hundred and ten, one until February first, nineteen hundred and eleven, one until February first, nineteen hundred and twelve, and one until February first, nineteen hundred and thirteen; the term of office of each commissioner so appointed shall begin on the first day of July, nineteen hundred and seven. Upon the expiration of each of such terms, the term of office of each commissioner thereafter appointed shall be five years from the first of February. Vacancies shall be filled by appointment for the unexpired term.

Parallel provisions as to Interstate Commerce Commission,—see Inters. Com. Act, §§ 11, 24, post, Appendix B.

Constitutional provisions as to appointment, etc.—see N. Y. Const., Art. X, § 2.

Appointment, term of office, and vacancies in office of Commissioner of Gas & Electricity,—see N. Y. Gas & El. Com. Act, § 3.

* Words in brackets are not a part of section heading as enacted.—Ed.

Parallel provisions as to former Board of Railroad Commissioners,—see N. Y. R. R. L., §§ 150, 151.

Parallel provisions as to the former Board of Rapid Transit Railroad Commissioners,—see N. Y. Rap. Tr. Act, § 1.

Eligibility of commissioners,—see post, § 9.

General rules of statutory construction,—see ante, § 1, notes [23]—[40].

Public Service Commissioners not local officers,—see post, § 5, note [3].

Effect of failure to take, or delay in filing, oath of office,—see post, § 9, note.

Qualifications of commissioners,—see post, § 15, note [2].

[1] Appointment.

Constitutionality of appointment of local officers by state officials,—see post, § 5, note [7].

The exercise of the power of appointment to office is a purely executive act.—*Ackeleys Case*, 4 Abb. Pr. (N. Y.) 35.

[2] Residence of local officers.

Under the N. Y. Public Officers Law, a local officer must be a resident of the local subdivision within which his official functions are to be exercised, and when he ceases to be a resident his office becomes vacant.—*Matter of Buhler*, 43 Misc. (N. Y.) 140, 88 N. Y. Supp. 195.

[3] Term of office.

While “until,” as an adverb of time, is usually a word of exclusion, it always includes the date which follows, when the connection and manifest intention so require.—*People v. Fitzgerald*, 180 N. Y. 269, 73 N. E. 55.

The legislature may change the term of any office not created or regulated by the Constitution.—*Long v. Mayor*, 81 N. Y. 425.

There is nothing in the N. Y. Constitution which expressly or by implication restrains the legislature from altering or changing the term of any office which it has once fixed.—*People v. Batchelor*, 22 N. Y. 128, affg. s. c. 28 Barb. (N. Y.) 310.

[4] Resignation.

The provision of the N. Y. Revised Statutes that an officer “shall continue to discharge the duties of his office, although his term of office

shall have expired, until a successor in such office shall have qualified," does not apply to an officer who has resigned, but his power and tenure terminate with his resignation.—*Olmsted v. Dennis*, 77 N. Y. 378.

The resignation of a drainage commissioner is complete when it is received by the county judge. No formal act by the latter is necessary to give it effect.—*Olmsted v. Dennis*, 77 N. Y. 378.

The acceptance of an incompatible office, operates as a resignation by the incumbent from the office then held by him.—*People ex rel. Henry v. Nostrand*, 46 N. Y. 375; *People ex rel. Whiting v. Carrique*, 2 Hill (N. Y.), 93.

Unless otherwise provided, an office becomes *ipso facto* vacant on the resignation of the incumbent.—*Gilbert v. Luce*, 11 Barb. (N. Y.) 91.

[5] Effect of vacancies on power of remaining members.

The policy of law is to guard against the failure of a public service, and a grant of power and duty in the nature of a public office to several does not become void or inoperative upon the death or disability of one or more.—*People ex rel. Kingsland v. Palmer*, 52 N. Y. 83.

[6] Removal from office — Power in general.

The legislature may lodge the power to remove from statutory offices in boards or other officers, subject to statutory regulations.—*Attorney-General v. Jochim*, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699.

The policy of government would be inherently defective if no remedy of a summary nature could be had to remove from office a person who neglected his duty or was guilty of malversation in the administration of his office.—*Clay v. Stuart*, 74 Mich. 411, 41 N. W. 1091.

If a state Constitution commits to the legislature the whole subject of the removal of given officers, the mode in which it shall be done, including the causes, charges, notice, investigation, determination, and everything necessary for the accomplishment of the object, are in the discretion of the legislature.—*Clay v. Stuart*, 74 Mich. 411, 41 N. W. 1091.

[7] — Whether an executive or a judicial act.

The removal of a sheriff by the governor is an executive not a judicial act.—*Matter of Guden*, 171 N. Y. 529, 64 N. E. 451, affg. s. c. 71 App. Div. (N. Y.) 422, 75 N. Y. Supp. 794.

The act of a governor in removing an officer is not the exercise of a judicial function.—*Lynch v. Chase*, 55 Kan. 367, 40 Pac. 666; *State ex rel. Attorney-General v. Hawkins*, 44 Oh. St. 98, 5 N. E. 228.

Because the act of the governor in determining the sufficiency of grounds of removal, and then removing, is judicial, it does not incapacitate him from acting where he discovered the delinquencies and himself preferred the charges.—*Attorney-General v. Jochim*, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699.

Removing a person from office for cause involves the exercise of judicial power. It must be conducted consonant with due process of law, which requires notice to the officer, a hearing, and determination.—*Clay v. Stuart*, 74 Mich. 411, 41 N. W. 1091.

[8] — Validity of statutes.

An act authorizing the governor to remove elective or appointive officers for "gross neglect of duty, corrupt conduct in office, or other misfeasance or malfeasance therein," is constitutional.—*Attorney-General v. Jochim*, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699.

An act which vests in the governor the power to remove for cause certain officers created by the legislature, is valid.—*Clay v. Stuart*, 74 Mich. 411, 41 N. W. 1091.

[9] — Notice.

The appointment of a successor to an appointive officer, removable at the pleasure of the appointing power, effects a removal without any notice of removal.—*People ex rel. Ward v. Drake*, 43 App. Div. (N. Y.) 325, 60 N. Y. Supp. 309.

[10] — What acts justify removal.

Certain acts by Commissioners defined as grounds for removal,—see post, § 15.

Removal of an officer "for cause" must be for some dereliction or general neglect of duty, or incapacity to perform the duties, or some delinquency affecting his general character and his fitness for the office. The cause assigned should be personal to himself, and implying an unfitness for the place. That some other man is a better man for the place, or more congenial to the appointing or removing power, is not a ground for removal under such a statute.—*People ex rel. Munday v. Fire Comrs.*, 72 N. Y. 445.

Words spoken under exasperating circumstances, though expressing refusal to obey instructions, etc., do not constitute neglect, malfeasance or misfeasance in office, warranting removal.—*People ex rel. Hill v. Mace*, 84 Hun (N. Y.), 344, 32 N. Y. Supp. 335.

Removal for "cause" can be only for a good reason, not a false reason which the removing power honestly but mistakenly believes to be true.—*Matter of Nichols*, 6 Abb. N. C. (N. Y.) 474.

Power to remove "for cause" does not confer an unlimited discretion, but only the right to proceed for some act of omission or commission by the officer in regard to his duties, or affecting his general character, which the law and a sound public opinion will pronounce to be sufficient to justify a forfeiture of the office and not in the political bias or personal dislike of the removing officer nor in his leanings towards another individual for whom the place is desired.—*Matter of Nichols*, 6 Abb. N. C. (N. Y.) 474.

An officer is not liable, before an impeachment tribunal, for a judicial act, unless he acted willfully, maliciously or corruptly.—*State v. Hastings*, 37 Neb. 96, 55 N. W. 774, 38 Neb. 584, 55 N. W. 774, 58 N. W. 32.

[11] — Due process.

On a removal for cause, the party against whom the proceeding is taken must be informed of the causes of the supposed removal, and be allowed an opportunity for explanation.—*People ex rel. Munday v. Fire Comrs.*, 72 N. Y. 445.

In removing an officer for cause, such officer is entitled to a personal notice of the proceedings and the time and place of the trial thereof, and to a copy of the charges specifically stated with substantial accuracy; to a reasonable time and opportunity to prepare his defense and produce his testimony; to be heard and defended by counsel; to cross-examine the witnesses, and to except to the proofs against him. If the charge be not denied, still it must, if not admitted, be examined and proved.—*Matter of Nichols*, 6 Abb. N. C. (N. Y.) 474.

"Due process" in removal of officers does not mean necessarily judicial process, but administrative process.—*Attorney-General v. Jochim*, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699.

Because removal from office must be for cause, upon specific charges, and after an opportunity to be heard, does not imply that such removal is a deprivation of "property," under the "due process" clause.—*Attorney-General v. Jochim*, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699.

In removing public officers, the state is not so bound by the term "due process of law" that it is impossible for it to invest its agents with these powers without subjecting itself to the delays and uncertainties of strict judicial action in cases of emergency.—*Attorney-General v. Jochim*, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699.

Removal for cause involves the exercise of judicial powers. Hence, it must be after a proper and duly noticed hearing on charges consisting of distinctly stated facts, not general charges of wrong or neglect.—*Dullam v. Willson*, 53 Mich. 392, 19 N. W. 112.

"Due process of law" is not necessarily judicial process, but is often purely executive or administrative.—*Weimer v. Bunbury*, 30 Mich. 201.

The suspension of a railroad commissioner after notice and a hearing under the provision of a statute empowering the governor to suspend a commissioner for certain causes, is "due process of law."—*Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554.

[12] — Review.

Where an officer has been removed from office by the governor, the courts will not review the action of the governor on the merits.—*Matter of Guden*, 171 N. Y. 529, 64 N. E. 421, affg. s. c. 71 App. Div. (N. Y.) 422, 75 N. Y. Supp. 794.

The acts and proceedings of the governor in removing an officer for cause may be judicially reviewed, but the courts should use the power very reluctantly.—*Matter of Nichols*, 6 Abb. N. C. (N. Y.) 474.

Under the statute of North Carolina giving the governor power to remove railroad commissioners for certain causes, when the power of suspension is exercised by the governor in an orderly manner, his act is not reviewable by the courts.—*Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554.

[13] — Restoration.

Where the specific charge stated is insufficient to justify removal, or where the removal is erroneous, and no good and sufficient ground therefor appears, an officer is entitled to a mandamus to restore him.—*Matter of Nichols*, 6 Abb. N. C. (N. Y.) 474.

[14] Validity of commission plan of regulation.

What bodies may be vested with the power to punish for contempt,—
see post, § 19, note [8].

State may authorize a commission to hear and determine complaints,
—see post, § 48, note [1].

*Validity of commission plan of regulating gas and electrical corporations,—*see post, § 66, note [5], § 72, note [2].

There is nothing in the statutes or constitution of the United States which prevents a state from creating a board of railroad commissioners, and what powers the board shall have will depend upon the law creating them, of which the courts of the state are the absolute interpreters.—*Mobile, J. & K. C. R. Co. v. Mississippi*, 210 U. S. 187, 28 Sup. Ct. R. (U. S.) 650.

Railroads, from the public nature of the business carried on, and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative body or by administrative bodies endowed with power to that end.—*Atlantic C. L. R. Co. v. N. Carolina Corp. Commission*, 206 U. S. 1, 27 Sup. Ct. R. (U. S.) 585, affg. s. c. 137 N. C. 1, 49 S. E. 191.

A state may, in the exercise of its police powers, confer on an administrative agency the power to make reasonable regulations as to the time, place and manner of delivery of merchandise, etc.—*McNeill v. So. R. Co.*, 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 26 Sup. Ct. R. (U. S.) 491.

The creation of a state railroad commission, with power to classify and regulate rates, is within the power of the Texas Legislature.—*Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. R. (U. S.) 1047.

Railroad corporations are subject to legislative control in all respects necessary to protect the public against danger, injuries, and oppression, and the state may exercise this control through boards of commissioners.—*New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. R. (U. S.) 437.

A state may give a state commission power over railway rates and service.—*Georgia R. & B. Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. R. (U. S.) 47, affg. s. c. 70 Ga. 694.

The statute of Mississippi creating a railroad commission and charging it with the duty of supervising railroads, is constitutional.—*Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 6 Sup. Ct. R. (U. S.) 334, 388, 1191.

It is within the constitutional powers of a state to regulate freight and passenger tariffs by a state railroad commission.—*Trammel v. Dinsmore*, 102 Fed. 794, revg. s. c. 92 Fed. 714.

The legislature may delegate the exercise of its powers as to regulating and establishing rates, in matters of detail, to an administrative board of its own creation.—*Western Union Tel. Co. v. Myatt*, 98 Fed. 335.

The state may regulate railroad rates, etc., by commission,—*Southern Pac. R. Co. v. Board of R. R. Comrs.*, 78 Fed. 236.

The establishment of a commission, whose duty is to see to it that railroad rates for the transportation of freight and passengers are just and reasonable, is clearly within the constitutional rights of the states.—*Clyde v. Richmond & D. R. Co.*, 57 Fed. 436.

The act creating a railroad commission in Tennessee held unconstitutional and ineffectual and the commission plan of regulation dis-

approved.—*Louisville & N. R. Co. v. R. R. Commission of Tenn.*, 19 Fed. 679.

The act of the Georgia legislature forbidding unreasonable or discriminatory rates, and providing for a commission to prescribe just and reasonable rates, is constitutional.—*Tilley v. Savannah, F. & W. R. Co.*, 5 Fed. 641.

The legislature may delegate to a commission created by it the power to fix the maximum rates to be charged by gas and electrical corporations.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123, 83 N. E. 693, revg. s. c. 122 App. Div. (N. Y.) 203, 107 N. Y. Sup. 341,

The Rapid Transit Act of 1894 is constitutional.—*Sun Publishing Assn. v. Mayor*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788, affg. s. c. 8 App. Div. (N. Y.) 230, 40 N. Y. Supp. 607.

The power of the state to fix rates may be exercised by a commission provided there is a standard fixed by which the commission is to be guided.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 341, revd. on other points, 191 N. Y. 123, 89 N. E. 693.

A Georgia act forbidding unjust discriminations, and creating a state railroad commission, is constitutional. In the exercise of its power over rates, etc., it was not expected the legislature should do more than pass laws to bring about the ends in view. The commissioners are officers clothed with power sufficient to effectually execute the law. Legislative grants of power to the officers of the law, to make rules and regulations which are to have the force and effect of laws, are common and valid.—*Georgia R. & B. Co. v. Smith*, 70 Ga. 694; affd. 128 U. S. 174, 9 Sup. Ct. R. (U. S.) 47.

The legislature of a state has the power to regulate charges by carriers, and, having such power, may confer it upon a municipality.—*Chicago U. Traction Co. v. City of Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

Since railroads take their charters subject to the common law principles forbidding discriminations, excessive charges, etc., the legislature may prescribe the methods and agencies to be used in enforcing these common law duties.—*Chicago & A. R. Co. v. People*, 67 Ill. 1.

The Indiana Railroad Commission Act is constitutional.—*Chicago, I. & L. R. Co. v. R. R. Commission*, 38 Ind. App. 439, 78 N. E. 338.

It is constitutional to vest a state railroad commission with power to permit roads to charge less for a longer than for a shorter distance.—*Louisville & N. R. Co. v. Commonwealth*, 106 Ky. 633, 21 Ky. L. R. 232, 51 S. W. 164, 1012.

Questions of what tolls may be charged on a highway, when more may be charged for a longer than for a shorter haul, etc., were not, at common law, subjects of judicial cognizance, and the state may, in the exercise of its police power, commit the decision of these questions to other branches of the government than the judiciary. It may create special agencies for the determination of such matters, and make their judgments final.—*Illinois Cent. R. Co. v. Commonwealth*, 23 Ky. L. R. 1159, 64 S. W. 975.

A Maine statute empowering the railroad commissioners to require railroads to build stations at specified points, is constitutional.—*Railroad Comrs. v. P. & O. C. R. Co.*, 63 Me. 269.

As the legislature has power itself to regulate charges by railroads, it can delegate to a commission the power of fixing such charges.—*State v. Ch. M. & St. P. R. Co.*, 38 Minn. 281, 37 N. W. 782, *revd.* on other grounds, 134 U. S. 418, 10 Sup. Ct. R. (U. S.) 462, 702.

Legislative powers as to railroad corporations may not be vested in a commission.—*State v. Gt. Northern R. Co.*, 100 Minn. 445, 111 N. W. 289.

A state may exercise through a commission its power to regulate railroad corporations.—*Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607.

The legislature has power to supervise, regulate and control the rates and conduct of common carriers, and this regulation may be exercised either directly or through a commission.—*Corporation Commission v. Atlantic C. L. R. Co.*, 139 N. C. 126, 51 S. E. 793.

The act of the North Carolina legislature creating a state railroad commission, with power to prevent excessive rates, is valid.—*Atlantic Express Co. v. Wilmington & W. R. Co.*, 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393n.

The North Carolina legislature may confer judicial powers on a state railroad commission, under the constitutional provision authorizing it to establish courts inferior to the Supreme Court.—*Atlantic Exp. Co. v. Wilmington & W. R. Co.*, 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393n.

The act creating the State Corporation Commission of Virginia upheld and interpreted.—*Atlantic C. L. R. Co. v. Commonwealth*, 102 Va. 599, 46 S. E. 911.

The power of the state to prescribe reasonable charges is in its nature legislative, and has always been exercised either directly by the legislature or by delegation to municipalities or other appropriate agencies.—*City of Madison v. Madison Gas & Elec. Co.*, 129 Wis. 249, 108 N. W. 65.

[15] Commissions as administrative bodies.

What powers are legislative, see post, note [18].

What powers are judicial, see post, note [19].

The Mississippi Railroad Commission is not a court but a mere administrative agency of the state.—*Mississippi R. R. Commission v. Ill. Cent. R. Co.*, 203 U. S. 335, 27 Sup. Ct. R. (U. S.) 90.

The State Railroad Commission, created by the Texas Legislature by its act of April 3, 1891, is an administrative board, created to carry out the will of the state as expressed by its legislation.—*Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. R. (U. S.) 1047.

The Interstate Commerce Commission is not a court but is an administrative body exercising powers which are quasi judicial.—*Interst. Com. Commission v. C. N. O. & T. P. R. Co.*, 64 Fed. 981.

The Interstate Commerce Commission is not an "inferior court," vested with judicial functions, but is a body invested only with administrative powers of supervision and investigation.—*Kentucky & I. Bridge Co. v. L. & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289.

The Interstate Commerce Commission is not a court, but a special tribunal whose duties though largely administrative are sometimes semi or quasi judicial.—*Toledo Prod. Exch. & E. Kemble v. L. S. & M. S. R. Co.*, 2 Inters. Com. R. 492, 569, 3 Inters. Com. R. 830, 5 I. C. C. R. 166.

Members of the Board of Health of the city of New York are administrative, not judicial officers.—*People ex rel. Lodges v. Dept. of Health*, 189 N. Y. 187.

The functions of a municipal civil service commission, although involving the exercise of judgment and discretion, are more of a legislative and executive character, than judicial or quasi judicial.—*People ex rel. Schau v. McWilliams*, 185 N. Y. 92, 77 N. E. 785.

The military board of examination is a judicial body.—*People ex rel. Smith v. Hoffman*, 166 N. Y. 462, 60 N. E. 187, 54 L. R. A. 597.

The Board of Railroad Commissioners of Connecticut is not a judicial tribunal. Its duties are not, except in a very limited sense, judicial. It stands in place of the legislature between corporations and the public and supervises the exercise of corporate powers, so no injustice may be done. Its duties are such as pertain to the administrative powers of the legislature itself.—*State v. N. H. & N. R. Co.*, 43 Conn. 351, affd., 104 U. S. 1.

The railroad commissioners of Florida are statutory officers whose powers are those and only those which are conferred upon them expressly or impliedly by the statutes of the state.—*State v. Atlantic C. L. R. Co.*, 51 Fla. 578, 40 So. 875.

The Louisiana Railroad Commission is an administrative board created by the state for carrying into effect the will of the state as expressed by its legislature.—*Morgan's L. & T. R. & S. S. Co. v. R. R. Commission*, 109 La. 247, 33 So. 214.

The Mississippi Railroad Commission is not a court but purely an administrative agency.—*Western U. Tel. Co. v. R. R. Commission*, 74 Miss. 80, 21 So. 15.

The railroad commission of North Carolina is an administrative and not a judicial body.—*Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554.

[16] Division of the powers of government.

The object of a written constitution is to regulate, define and limit the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers. The safety of free government rests upon the independence of each branch and the even balance of power between the three. Unite any two of them and they will absorb the third with absolute power as a result. Weaken any one of them by making it unduly dependent on the others, and a tendency to the same evil follows. It is a fundamental principle of the organic law that each department should be free from interference in the discharge of its peculiar duties, by either of the others.—*People ex rel. Burby v. Howland*, 155 N. Y. 270, 49 N. E. 775.

It is a part of our state system to commit many governmental powers, involving judicial, executive and ministerial functions, to a single officer, or a board or commission, the exercise of the executive or ministerial duty being in some cases dependent upon the exercise of the judicial function. Our Constitution, unlike that of the United States, does not commit the whole judicial power to the courts in the first instance.—*People ex rel. Babylon R. Co. v. Board of R. R. Comrs.*, 32 App. Div. (N. Y.) 179, 52 N. Y. Supp. 908, affd. 158 N. Y. 711, 53 N. E. 1129.

[17] Whether legislative and judicial powers may be delegated.

See also, post, note [18].

Whether power to punish for contempt can be delegated to a commission, see post, § 19, note [8].

There is no provision in the Federal Constitution which directly or impliedly prohibits a state, under its own laws, from conferring upon non-judicial bodies certain functions which may be called judicial.—*Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. R. (U. S.) 178, affg. s. c. — Vt. —, 66 Atl. 790.

The legislative power of Congress cannot be delegated to the president, but Congress may delegate discretion as to its execution.—*Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. R. (U. S.) 495, affg. s. c. 45 Fed. 175.

Although Congress cannot delegate to the courts or any other tribunals powers strictly and exclusively legislative, and although the line has not been exactly drawn that separates the important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made, and powers given to those who are to act under such general provisions to fill up the details, Congress may delegate to others powers which the legislature may rightly exercise itself, and the maker of the law may commit something to the discretion of the other departments.—*Wayman v. Southard*, 10 Wheaton (U. S.), 1.

While it is true, if the propositions are not construed too broadly, that the legislative power cannot be delegated and that rate-making is a legislative power, both propositions are liable to such misconstruction. If by the second provision it is intended to assert that the rate-making powers is vested in the legislature, it is true. But if it is intended to go further and deny the power of the legislature to confer by general laws upon other branches of the legislature, not only the duty of executing the law but of determining its application to particular cases, and the formulation of the rules for its exercise, then it is not true.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123, 83 N. E. 693, revg. s. c. 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 341.

Legislative power cannot be delegated, but must be exercised solely by the legislature.—*Barto v. Himrod*, 8 N. Y. 483; *Rice v. Foster*, 4 Harr. (Del.) 479; *Bradshaw v. Lankford*, 73 Md. 428, 21 Atl. 66, 11 L. R. A. 582.

The legislature cannot delegate to an individual the authority to determine by the mere exercise of his judgment whether a statute ought to take effect.—*Barto v. Himrod*, 8 N. Y. 483.

The judicial power of the state is exclusively vested in the officers or bodies expressly designated by the Constitution, and the legislature has no power to vest in other bodies or departments of government judicial powers or to authorize such other departments or officers of the government to issue process which shall be due process of law.—*People ex rel. MacDonald v. Leubischer*, 34 App. Div. (N. Y.) 577, 54 N. Y. Supp. 869, affg. s. c. 23 Misc. (N. Y.) 495, 51 N. Y. Supp. 735.

The legislature may authorize a board to make rules and regulations as acts of executive administration, but it cannot authorize it to declare what shall be a misdemeanor or impose a penalty.—*Harbor Comrs. v. Redwood Co.*, 88 Cal. 491, 26 Pac. 375.

A legislature may create boards or commissions in the administration of the government, and invest them with such legislative powers as

shall be appropriate and necessary to effectuate the objects of their creation.—*People v. Harper*, 91 Ill. 357.

The legislative power to tax cannot, without the consent of the people, be delegated to any body or persons not elected by, and immediately responsible to, the people.—*State v. Des Moines*, 103 Iowa, 76, 72 N. W. 639, 39 L. R. A. 285.

An act of the Michigan legislature creating an appointive Board of Park Commissioners and delegating to it discretionary powers, not merely administrative, including the power to create an indebtedness, is unconstitutional.—*People v. Detroit*, 28 Mich. 228.

The legislature may delegate to a commission the power to determine some fact on which the statute makes its own action depend.—*Elwell v. Comstock*, 99 Minn. 261, 109 N. W. 698.

Delegation of legislative powers to a district court is unconstitutional.—*State v. Simmons*, 32 Minn. 540, 21 N. W. 750.

The legislature may not delegate to a commission created by it the legislative power to determine, in its judgment and discretion, whether or not there shall be an increase of the capital stock of a corporation in any case, and to prescribe the manner in which and the terms on which the same may be made, if allowed, for that would be unconstitutional, as a delegation of legislative power to an administrative tribunal. The legislature may validly delegate to a commission the administrative duty of determining the facts on each application of a corporation to be allowed to increase its capital stock, and, if the facts bring the application within the terms, conditions and limitations, upon which existing statutes authorize an increase, allow it; otherwise, deny it.—*State v. Gt. Northern R. Co.*, 100 Minn. 445, 111 N. W. 289.

The legislature cannot delegate its law-making power, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend.—*Locke's Appeal*, 72 Pa. 494.

The universal construction of the maxims that the "legislative, executive and judiciary departments shall be separate and distinct" has been that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, but that either department may exercise the powers of another to a limited extent. The act creating the State Corporation Commission of Virginia is not unconstitutional because it clothes that body with certain legislative, judicial and executive powers.—*Winchester & S. R. Co. v. Commonwealth*, 106 Va. 264, 55 S. E. 692.

[18] What powers are legislative.

Schedule-making power of carriers not legislative,—see post, § 28, note [3.]

Granting of franchises a legislative function, see post, § 53, note [13].

The Federal Safety Appliance Law, § 5, authorized the American Railway Association to designate to the Interstate Commerce Commission the standard height of draw bars for freight cars and provided that upon such designation by the Association, the Commission should give notice to all common carriers of the standard so fixed.—*Held*, that this section was not invalid as delegating legislative power to the Association or the Commission.—*St. Louis & I. M. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. R. (U. S.) 616.

The powers conferred on the Interstate Commerce Commission as to uniformity of rates are administrative.—*Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. R. (U. S.) 350, revg. s. c. 12 Tex. Ct. R. 498, 85 S. W. 1052.

By a general statute Congress declared in effect that navigation in rivers should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, etc. It imposed on the Secretary of War the duty of ascertaining what particular cases come within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases.—*Held*, that this was not a delegation of legislative power.—*Union Bridge Co. v. U. S.*, 204 U. S. 364, 27 Sup. Ct. R. (U. S.) 367.

Where a statute declares the general rules and principles, provides the methods of procedure and acts upon the subject as far as possible, and leaves to executive officers the duty of applying the rules and principles and bringing about the results pointed out, it is not unconstitutional as vesting executive officers with legislative functions.—*Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. R. (U. S.) 349; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. R. (U. S.) 495.

The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not administrative or judicial function.—*Interst. Com. Commission v. C. N. O. & T. P. R. Co.*, 167 U. S. 479, 17 Sup. Ct. R. (U. S.) 896.

Authorizing common carriers to establish rates which, when published and filed, shall be the lawful rates, does not confer legislative power on the carrier.—*U. S. v. Standard Oil Co.*, 155 Fed. 305.

The power is legislative which defines rights, permits things to be done, or prohibits the doing thereof.—*U. S. v. Matthews*, 146 Fed. 306.

An act making it a criminal offense to violate any rule or regulation made by the Secretary of the Interior for the protection of the forest preserves, is void, as an attempted delegation of legislative power. The

legislature may authorize other officers to make rules and regulations for carrying its laws into effect, but it cannot leave a statute to be enlarged upon or defined by an administrative or judicial officer.—*U. S. v. Matthews*, 146 Fed. 306.

The giving of a franchise, consents, etc., and the performing of such acts as the state has declared to be necessary in order to create a franchise, are legislative powers and functions.—*Ghee v. Northern Union Gas Co.*, 158 N. Y. 510, 53 N. E. 692.

An Act provided, among other things, that "at a point where a street * * * or traveled way is crossed at the same level by a railroad * * * the Supreme Court or County Court may, upon the application of the local authorities and upon ten days' notice to the railroad corporation whose road so crosses, order * * * that gates shall be erected across such streets," etc.—*Held*, that the Act was not invalid as delegating legislative powers to the courts, as no legislative power is given to the courts, but the statute makes the erection and operation of gates dependent upon the necessity of them for safe travel, such necessity to be determined by the courts.—*People v. L. I. R. R. Co.*, 134 N. Y. 506, 31 N. E. 873.

Authorizing the N. Y. Board of Railroad Commissioners to grant a certificate that no public interests require an extension of railroad provided for in a corporate charter, and making such certificate a bar to any attempt to annul the charter of such railroad for failure to make such extension, delegated no legislative power to such Board.—*People v. Ulster & D. R. Co.*, 128 N. Y. 240, 28 N. E. 635.

Giving the commissioners under the Rapid Transit Act of 1875 power to determine on the necessity of railways, fix routes, prescribe the plan of their construction and operation, etc., confers no legislative power upon the commissioners, who simply perform administrative acts in carrying the law into effect and applying it.—*Matter of N. Y. El. R. Co.*, 70 N. Y. 327, 3 Abb. N. C. (N. Y.) 401, affg. s. c. 7 Hun (N. Y.), 239.

The fixing of rates for public service corporations is a legislative function.—*Brooklyn Union Gas Co. v. New York*, 115 App. Div. (N. Y.) 69, 100 N. Y. Supp. 625, affd. 188 N. Y. 334, 81 N. E. 141.

The power to establish a tariff of rates is a legislative function.—*Village of Saratoga Springs v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 341, revd. on other points, 191 N. Y. 123, 83 N. E. 693. *Steenerson v. Gt. Northern R. Co.*, 69 Minn. 353, 72 N. W. 713.

An act granting power to a commissioner to be exercised on conditions and in the general manner prescribed by the legislature, is not a delegation of legislative power.—*Grant v. Courter*, 24 Barb. (N. Y.) 232.

An act of the legislature provided that the electors of the state, at the next annual election, should determine whether such act should or should not become a law.—*Held*, that the act was not unconstitutional as an attempt to delegate legislative power to the people.—*Johnson v. Rich*, 9 Barb. (N. Y.) 680.

Vesting the state railroad commission with power to fix reasonable rates is not unconstitutional as a delegation of legislative or judicial power.—*Storrs v. Pensacola & A. R. Co.*, 29 Fla. 617, 11 So. 226.

Giving a state railroad commission power to fix rates is not a delegation of legislative power.—*Railroad Comrs. v. Pensacola & A. R. Co.*, 24 Fla. 417, 5 So. 129, 2 L. R. A. 504.

The powers vested in the Georgia railroad commissioners are not legislative. The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed, is apparent.—*Georgia R. & B. Co. v. Smith*, 70 Ga. 694, *affd.* 128 U. S. 174, 9 Sup. Ct. R. (U. S.) 47.

Giving the inspector of factories the discretion as to the number, location, construction, etc., of fire escapes on buildings, does not render the Illinois Act of 1897 unconstitutional, as delegating legislative power to an administrative officer.—*Arms v. Ayer*, 192 Ill. 601, 61 N. E. 851, 58 L. R. A. 277.

A statute of Illinois authorizing a commission to fix a schedule of maximum rates for all railroads within the state is not unconstitutional as an attempted delegation of legislative power.—*Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141.

A statute which provides that railroads shall issue mileage books, but permits the railroad commission to excuse any railroad from issuing such books where public welfare or the financial condition of the road justifies, is not unconstitutional on the ground that it contains a delegation of legislative power to the railroad commission.—*Attorney Gen. v. Old Colony R. Co.*, 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112.

A statute requiring a carrier to build a station-house may require such structure to be "commodious" in the opinion of commissioners appointed by the court.—*Commonwealth v. Eastern R. Co.*, 103 Mass. 254.

A statute authorizing a commission, in its discretion, to permit a railway corporation to increase its capital stock, is void as a delegation of legislative power.—*State v. Gt. Northern R. Co.*, 100 Minn. 445, 111 N. W. 289.

An act empowering the state insurance commissioner to determine what provisions of insurance contracts are lawful and which are not, is unconstitutional, as delegating legislative power.—*Anderson v. Assurance Co.*, 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609.

The grant by a legislature of authority to a commission to fix and determine rates is not objectionable as a delegation of legislative power, as the commission is administrative merely.—*State v. Ch. M. & St. P. R. Co.*, 38 Minn. 281; revd. on other grounds, 134 U. S. 418, 10 Sup. Ct. R. (U. S.) 462, 702.

An act authorizing the Railroad and Warehouse Commission to find and determine whether the tariffs of rates, classifications, etc., are just and reasonable, and if not, to compel the carrier to make them so, does not delegate legislative power.—*State v. Ch. M. & St. P. R. Co.*, 38 Minn. 281, 37 N. W. 282; revd. on other grounds, 134 U. S. 418, 10 Sup. Ct. R. (U. S.) 462, 702.

Giving a state railroad commission power to determine what are equal and reasonable rates is not a delegation of legislative power.—*State v. Ch. M. & St. P. R. Co.*, 38 Minn. 281, 37 N. W. 782; revd. 134 U. S. 418.

A statute giving to the Board of Agriculture of North Carolina power to regulate the transportation of cattle is not invalid as an unlawful delegation of legislative power.—*State v. So. R. Co.*, 141 N. C. 846; 54 S. E. 294.

The power to fix rates is a legislative function which the courts cannot exercise.—*Griffin v. Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240.

The act of the North Carolina legislature creating a state railroad commission, denouncing excessive charges, unjust discriminations, etc., as unlawful, and authorizing the commission to "make such just and reasonable rules and regulations as may be necessary for preventing the same," does not confer on that body anything of legislative power.—*Atlantic Exp. Co. v. Wilmington & W. R. Co.*, 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393n.

The power to determine how much money shall be spent for public buildings, is purely legislative and cannot be delegated.—*State v. Budge*, 14 N. Dak. 532, 105 N. W. 724.

[19] What powers are judicial.

Power to punish for contempt a judicial function,—see post, § 19, note [8].

By a general statute Congress declared in effect that navigation in rivers should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, etc. It imposed on the Secretary of War the duty of ascertaining what particular cases come within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases.—*Held*, that this was not a delegation of judicial

power.—*Union Bridge Co. v. U. S.*, 204 U. S. 364, 27 Sup. Ct. R. (U. S.) 367.

Whether or not a given rate is reasonable and just, or whether it is unjustly discriminatory or prejudicial, are clearly judicial questions.—*Jewett v. Ch. M. & St. P. R. Co.*, 156 Fed. 160.

In consenting, under N. Y. R. R. L., § 34, to the discontinuance of a station, the N. Y. Board of Railroad Commissioners acted judicially. The action of the board clearly was not legislative, for it was not in the nature of making a law, but of determining a controversy. It was not ministerial, because the commissioners were not required by law to do a specified act in a specified way upon a given state of facts without regard to their own judgment as to the propriety of the act, and with no power to exercise discretion. It was, however, judicial, because the law impliedly required them to decide upon a question of fact and to exercise their judgment upon evidence in determining whether the consent should be given or not.—*People ex rel. Loughran v. Board of R. R. Comrs.*, 158 N. Y. 421, 53 N. E. 163, affg. s. c. 32 App. Div. (N. Y.) 158, 52 N. Y. Supp. 901.

When the law requires a public officer to do a specified act, in a specified way, upon a conceded state of facts, without regard to his own judgment as to the propriety of the act and with no power to exercise discretion, the duty is regarded as ministerial in character. When, however, the law requires a judicial determination to be made, such as the decision of a question of fact or the exercise of judgment in deciding whether the act should be done or not, the duty is regarded as judicial.—*People ex rel. Harris v. Comrs.*, 149 N. Y. 26, 43 N. E. 418.

Authorizing the New York Board of Railroad Commissioners to grant a certificate that no public interests require an extension of a railroad provided for in a corporate charter, and making such certificate a bar to any attempt to annul the charter of such railroad for failure to make such extension, conferred no judicial functions upon such board.—*People v. Ulster & D. R. Co.*, 128 N. Y. 240, 28 N. E. 635.

Decisions of the Commissioners of the Land Office upon questions of fact are judicial.—*People ex rel. Burnham v. Jones*, 112 N. Y. 597, 20 N. E. 577.

Where a subordinate body is vested with power to determine a question of fact, the duty is judicial.—*People ex rel. Francis v. Common Council*, 78 N. Y. 33, revg. s. c. 18 Hun (N. Y.), 20.

That a public officer or board exercises judgment and discretion in the discharge of his duties, does not make his actions or powers judicial in their nature.—*People ex rel. Corwin v. Walter*, 68 N. Y. 403.

The powers conferred upon the Board of Commissioners of the Metropolitan Sanitary District of New York are not judicial, but administra-

tive, in their nature.—*Metropolitan Board of Health v. Heister*, 37 N. Y. 661.

The powers vested in the Commissioners of Pilots of New York harbor, being discretionary, are judicial in their nature.—*Board of Comrs. of Pilots v. Vanderbilt*, 31 N. Y. 265, affg. 2 Robt. (N. Y.) 367.

Greater N. Y. Ch., § 119, authorizing commissioners of accounts appointed by the mayor to examine the accounts of municipal officers, and take testimony under oath, is not void as conferring judicial powers.—*Matter of Hertle (In re Ahearn)*, 120 App. Div. (N. Y.) 717, 105 N. Y. 1022.

The action of the N. Y. Board of Railroad Commissioners, under N. Y. R. R. L., § 100, in permitting a railroad to change its motive power, was not legislative, since it was not law-making in its nature. It was not executive or ministerial, because the statute does not prescribe that the board shall approve the application or disapprove it, according as certain consents shall be given or withheld, or certain formal proofs made or left unmade; but it was judicial because the statute makes the board a tribunal to hear and determine the matter.—*People ex rel. Babylon R. Co. v. Board of R. R. Comrs.*, 32 App. Div. (N. Y.) 179, 62 N. Y. Supp. 908; affd., 158 N. Y. 711, 53 N. E. 1129.

An act empowering the N. Y. Board of Railroad Commissioners to grant certificates of necessity, is not an assumption of judicial power by the legislature, nor is it void as conferring judicial power on an administrative board.—*People v. Ulster & D. R. Co.*, 58 Hun (N. Y.), 266, 12 N. Y. Supp. 303.

Giving the inspector of factories the discretion as to the number, location, construction, etc., of fire escapes on buildings, does not render the Illinois Act of 1897 unconstitutional, as delegating judicial power to an administrative officer.—*Arms v. Ayer*, 192 Ill. 601, 61 N. E. 851, 58 L. R. A. 277.

The act of setting aside a rate complained of, and fixing another, upon evidence introduced, upon a complaint filed, is the exercise of a quasi-judicial power.—*Chicago, I. & L. R. Co. v. R. R. Commission*, 38 Ind. App. 439, 78 N. E. 338.

An act creating a state railroad commission and authorizing it to fix rates is not invalid because it delegates to a non-judicial body the duty of hearing and collecting the evidence on which a court is to render a decision.—*Chicago, I. & L. R. Co. v. R. R. Commission*, 38 Ind. App. 439, 78 N. E. 338.

The fixing of rates is a legislative function, but the determination of the question whether such rates are reasonable, is a judicial function, by virtue of the constitutional guaranty that no one shall be deprived of property without due process of law.—*Steenerson v. Gt. Northern R. Co.*, 69 Minn. 353, 72 N. W. 713.

The passing of an act fixing the maximum rates to be charged by railroads is not a usurpation of judicial authority by the legislature.—*Blake v. Winona & St. P. R. Co.*, 19 Minn. 418; *affd.*, 94 U. S. 180.

[20] Whether statutes delegate legislative, executive or judicial power.

See also, ante, notes [19], [20].

The Interstate Commerce Act is not unconstitutional as attempting to vest judicial powers in the Interstate Commerce Commission, as that law does not purport to deprive the courts of their jurisdiction at the suit of a shipper to ultimately determine the question of the reasonableness or unreasonableness of a rate.—*U. S. v. Standard Oil Co.*, 155 Fed. 305.

The statute of Florida creating the state railroad commission vests it with executive, legislative and quasi-judicial powers.—*Louisville & N. R. Co. v. Brown*, 123 Fed. 946.

The act creating the state Board of Railroad Commissioners conferred on it judicial powers.—*People v. N. Y. L. E. & W. R. Co.*, 104 N. Y. 58, 9 N. E. 856.

The Rapid Transit Act of 1875 does not delegate legislative power to the Board of Rapid Transit Commissioners.—*Matter of Gilbert El. R. Co.*, 70 N. Y. 361, 3 Abb. N. C. (N. Y.) 434, *affg.* 9 Hun (N. Y.) 303.

§ 5. *[Territorial] Jurisdiction of commissions; * [powers of Board of Rapid Transit Railroad Commissioners vested in commission of the first district].—The jurisdiction, supervision, powers and duties of the public service commission in the first district shall extend under this act:

1. To railroads and street railroads lying exclusively within that district, and to the persons or corporations owning, leasing, operating or controlling the same.

2. To street railroads any portion of whose lines lies within that district, to all transportation of persons or property thereon within that district or from a point within either district to a point within the other district, and to the persons or corporations owning, operating, controlling or leasing the said street railroads; provided, however, that the commission for the second district shall have jurisdiction over such portion of the lines of said street railroads as

* Words in brackets are not a part of section heading as enacted.—Ed.

lies within the second district, and over the persons or corporations owning, operating, controlling or leasing the same, so far as concerns the construction, maintenance, equipment, terminal facilities and local transportation facilities of said street railroads within the second district.

3. To such portion of the lines of any other railroad as lies within that district, and to the person or corporation owning, leasing, operating or controlling the same, so far as concerns the construction, maintenance, equipment, terminal facilities and local transportation facilities, and local transportation of persons or property within that district.

4. To any common carrier operating or doing business exclusively within that district.

5. To the manufacture, sale or distribution of gas and electricity for light, heat and power in said district, and to the persons or corporations owning, leasing, operating or controlling the same.

6. And in addition thereto, the commission in the first district shall have and exercise all powers heretofore conferred upon the board of rapid transit railroad commissioners under chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants," and the acts amendatory thereto.

All jurisdiction, supervision, powers and duties under this act not specifically granted to the public service commission of the first district shall be vested in, and be exercised by, the public service commission of the second district, including the regulation and control of all transportation of persons or property, and the instrumentalities connected with such transportation, on any railroad other than a street railroad from a point within either district to a point within the other district.

General jurisdiction of the Interstate Commerce Commission,—see Inters. Com. Act, § 1, post, Appendix B.

General jurisdiction of former Commission of Gas and Electricity,—see N. Y. Gas & El. Com. Act, § 9.

General powers of former Board of Railroad Commissioners,—see N. Y. R. R. L., § 157.

General powers of former Board of Rapid Transit Railroad Commissioners,—see N. Y. Rap. Tr. Act, § 1, post, Appendix A.

Principal offices of the respective Commissions,—see post, § 10.

- A railroad operating a line partly within each district makes its annual report to the Commission of the second district,—see post, § 46.*
- A street railroad operating a line partly within each district makes its annual report to the Commission of the first district,—see post, § 46.*
- Jurisdiction of Commissions for granting certificates of necessity to railroad and street railroad corporations,—see post, § 53.*
- Jurisdiction of Commissions to approve issue of stock, bonds, etc., of railroad corporations,—see post, § 55.*
- Jurisdiction of Commissions over gas and electrical corporations supplying consumers in both districts,—see post, § 76.*
- Board of Railroad Commissioners abolished and its powers and duties transferred to the Public Service Commissions,—see post, § 80.*
- Commission of Gas and Electricity abolished, and its powers and duties transferred to the Public Service Commissions,—see post, § 81.*
- Office of Inspector of Gas Meters abolished and powers and duties transferred to the Public Service Commissions,—see post, § 82.*
- Board of Rapid Transit Railroad Commissioners abolished and its powers and duties transferred to the Public Service Commission of the first district,—see also post, § 83.*
- Nothing in this Act is deemed to apply to or operate upon interstate or foreign commerce,—see post, § 86.*
- General rules of statutory construction,—see ante, § 1, notes [23]–[40].*
- Power of the legislature to create new civil divisions for regulative purposes,—see ante, § 3, note.*

[1] Whether the New York Rapid Transit Act is a general act.

There might be some difficulty in sustaining the New York Rapid Transit Act if its constitutionality depended upon its being general instead of local.—*Sun Publishing Assn. v. Mayor*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788, affg. s. c. 8 App. Div. (N. Y.) 230, 40 N. Y. Supp. 607.

[2] New York Rapid Transit Railroad Commissioners local officers.

The N. Y. Rapid Transit Railroad Commissioners are local officers lawfully appointed by the legislature for the locality. Their functions are strictly local. Their primary function is to consider and determine whether it is for the interests of the public and the city that a rapid transit railway should be established therein.—*Sun Publishing Assn.*

v. *Mayor*, 8 App. Div. (N. Y.) 230, 40 N. Y. Supp. 607; *affd.*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788.

[3] Public Service Commissions Law not a local act.

"After a careful examination of the authorities, I am constrained to hold that they do not sustain the contention that the bill [The Public Service Commissions Law] is a local act."—*Opinion of Corporation Counsel F. K. Pendleton*, rendered to Comptroller H. A. Metz, July 13, 1907.

"I cannot see that the duties of the [Public Service] commissioners are in any way those of city officers. These duties are those previously conferred upon the Railroad Commissioners, the Rapid Transit Commissioners and other State Boards, and the new and added powers given by the Act [Public Service Commission Law] are not of such a nature as to make the Commissioners city officers."—*Opinion of Corporation Counsel F. K. Pendleton*, rendered to Comptroller H. A. Metz, July 13, 1907.

[4] What functions and officers are local.

Whether public officials are local or state officers depends upon the functions they are required to perform, not upon the source of their appointment. Their character does not depend on the form or general structure of the act.—*Sun Publishing Assn. v. Mayor*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788, *affg. s. c.* 8 App. Div. (N. Y.) 230, 40 N. Y. Supp. 607.

The act creating a board of fire examiners within New York City is not unconstitutional in providing for their appointment other than by the local authorities. They are not city officers, although their jurisdiction is confined to one city.—*N. Y. Fire Dept. v. Atlas Ss. Co.*, 106 N. Y. 566, 13 N. E. 329.

The members of the Board of Revision and Correction, created by the laws of 1861, act as independent public officers, engaged in the public service. They were not selected by the municipal corporation, and it could not control their acts. Even if they may properly be called city officers, they are charged with a public service, and their powers are not to be exercised solely for the benefit of the municipal corporation.—*Tone v. Mayor*, 70 N. Y. 157.

As the city and county are identical as political divisions of the state, and the distinction between them is nominal rather than real and practical, it would be straining the provisions of the Constitution to hold that conferring power upon an officer in the same locality would be void because some of his lawful functions in their nature pertained to the county rather than the city organization.—*Matter of Lester*, 21 Hun (N. Y.), 130.

[5] Power of state to resume or transfer local functions.

Whether the transfer of powers from one officer to another impairs obligation of franchise contracts,—see ante, § 1, note [15].

L. 1885, ch. 499, requiring companies operating or intending to operate electrical conductors in any city in the state to file maps and plans with the Board of Commissioners of Electrical Subways is constitutional. It simply transferred the reserved police power of the state from one set of functionaries to another; viz., from the commissioner of public works to the board of commissioners of subways.—*People ex rel. N. Y. Elect. Lines v. Squire*, 145 U. S. 175, 12 Sup. Ct. R. (U. S.) 880.

The legislature has the power to transfer the control of the streets from the city officers who have previously exercised the same, to some other board or department of the city government.—*Wilcox v. McClellan*, 185 N. Y. 9, 77 N. E. 986.

Local functions cannot be transferred to a state officer. The legislature has the power to regulate, increase or diminish the duties of the local officer, but this power is subject to the limitation that no essential or exclusive function belonging to the office can be transferred to an officer appointed by central authority.—*People ex rel. Metropolitan St. R. Co. v. Tax Comrs.*, 174 N. Y. 417, 67 N. E. 69.

It is no violation of the "home rule" principle to delegate to officers appointed by the governor, powers which have never been exercised by local officers and which are not exclusively local in character.—*People ex rel. Metropolitan St. R. Co. v. Tax Comrs.*, 174 N. Y. 417, 67 N. E. 69.

An act abolishing the office of commissioner of jurors in the City of New York appointed by the mayor, and providing that in counties of more than one million inhabitants a commissioner of jurors shall be appointed by the justices of the Appellate Division in that department in which such county is located, is constitutional.—*Matter of Allison v. Welde*, 172 N. Y. 421, 65 N. E. 263.

The legislature, unless restrained by constitutional limitations, may resume powers delegated to localities, and assume the direct control of matters pertaining to local government.—*People ex rel. Morrill v. Supervisors*, 112 N. Y. 585, 20 N. E. 549.

The common council of New York City provided for the selection of jurors, and designated the assessors to make such selections. The Act of 1847 took such powers away from the council, and provided that the supervisors of the city, judges of the superior court, and judges of the court of common pleas, should appoint a commissioner of jurors, who should make the selections, etc. In 1873, the functions and office were merged in a distinctively city office filled by appointment of the

mayor and council.—*Held*, that the Act of 1873 was constitutional.—*People ex rel. Taylor v. Dunlap*, 66 N. Y. 162.

The transfer of the functions of commissioner of jurors, in and for New York City and county, from a county to a city office may be accomplished by an act which by its title is indicated to be a revision of the New York City Charter.—*People ex rel. Taylor v. Dunlap*, 66 N. Y. 162.

In view of the anomalous relation between the city and county of New York, there can be no incongruity in committing to the city authorities the functions of commissioner of jurors within the city and county.—*People ex rel. Taylor v. Dunlap*, 66 N. Y. 162.

By vesting the functions of commissioner of jurors in a county office, the legislature lost none of its power to vest them in a city office. What it could have done originally, it could do by subsequent enactment.—*People ex rel. Taylor v. Dunlap*, 66 N. Y. 162.

The power to make improvements, etc., was vested in the mayor and council of New York City. The legislature passed an act authorizing the improvement and regulation of Central Park, and placed the work under the authority of a board of commissioners, not appointed by the local authorities.—*Held*, that this was not an unconstitutional taking away of the powers of local officers.—*Astor v. Mayor*, 62 N. Y. 567, limiting *In re Comrs. of Central Park*, 35 How. Pr. (N. Y.) 255.

From time to time, as the occasion may require, police powers committed to the towns, cities or counties, may be resumed by the state and vested in other authorities appointed by the state government.—*People v. Shepard*, 36 N. Y. 285.

The legislature may recall to itself, and exercise at its pleasure, as much of the power it has conferred upon a municipal corporation as is not secured to it by its charter.—*People v. Pinckney*, 32 N. Y. 377.

It would not be competent for the legislature to create a new civil division of the state, and abrogate the local offices of the several counties that compose it, and direct the appointment by the governor and senate of other officers limited to perform the same local functions only, though distinguished by new and more extended titles.—*People v. Pinckney*, 32 N. Y. 377.

If from exceptional causes the public good requires that legislation be directed towards any particular locality, whether consisting of one county or several counties, it is within the discretion of the legislature to apply such legislation as, in its judgment, the exigency of the case may require, and it is the sole judge of the existence of such causes. It belongs to the legislature to arrange and distribute the administrative functions, committing such portions as it may deem suitable, to local jurisdiction, and retaining other portions to be exercised by

officers appointed by the central power, and changing the arrangement from time to time as convenience, the efficiency of administration, and the public good, may require.—*People ex rel. Wood v. Draper*, 15 N. Y. 532, affg. s. c. 25 Barb. (N. Y.) 344.

To establish judicially the principle that the legislature can never reduce the administrative authority of counties, cities or towns; can never resume in favor of the central power any portion of the jurisdiction of those local divisions, or change the partition of it among them, as it existed when the N. Y. Constitution was adopted, would make an impracticable government.—*People ex rel. Wood v. Draper*, 15 N. Y. 532, affg. s. c. 25 Barb. (N. Y.) 344.

Powers of local legislation and regulation, which have been conferred on local boards under N. Y. Const. Art. III., § 27, may be at any time resumed by the legislature.—*Matter of Reddish*, 45 App. Div. (N. Y.) 37, 60 N. Y. Supp. 1111.

Local powers may be transferred by the legislature from one body of local officers to another.—*Matter of Lester*, 21 Hun (N. Y.), 130.

The legislature cannot confer the power to perform local functions, and make regulations relating thereto, upon state officers, whether appointed by the legislature, or by the governor and senate. While the legislature might take such powers away from the mayor, council and existing boards of the city, the performance of them must be continued in the hands of the local officers or boards, and cannot be vested in officers appointed under the authority of the state.—*People v. Acton*, 48 Barb. (N. Y.) 524, 33 How. Pr. (N. Y.) 52.

Counties, townships, highway districts, school districts, etc., are governmental agencies and it is doubtful if they have any right which can be called private, and whatever rights or obligations they have depend upon the constitution or law of the state and otherwise would not exist.—*Attorney-General v. Lowrey*, 131 Mich. 639, 92 N. W. 289.

[6] Attitude of the courts toward the home rule doctrine.

The provisions of the different Constitutions of New York State relative to the election or appointment of local officers, when read in the light of prior and contemporaneous history, show that the object of their enactment was to prevent centralization of power in the state and to continue, preserve and expand local self-government.—*People ex rel. Metropolitan St. R. Co. v. Tax Comrs.*, 174 N. Y. 417, 67 N. E. 69.

The principle of "home rule," or the right of self-government as to local affairs, existed prior to the adoption of the N. Y. Constitution.—*People ex rel. Metropolitan St. R. Co. v. Tax Comrs.*, 174 N. Y. 417, 67 N. E. 69.

So far as practicable, matters of administration specially affecting the public interests of a particular locality should be controlled by the local government, subject to such general regulations as may be necessary for the common good.—*People ex rel. Morrill v. Supervisors*, 112 N. Y. 585, 20 N. E. 549.

The courts cannot, in furtherance of the supposed tendency toward decentralization and home rule, traceable in the N. Y. Constitution, however plainly it may be perceived, create exceptions or restraints on the legislature which are not fairly contained in the Constitution as it is written. The following out or advancing of such a policy is for the legislature, not the courts.—*People ex rel. Wood v. Draper*, 15 N. Y. 532.

As descriptive of a policy, "home rule" is a significant and appropriate term; but as descriptive of a right, it is indefinite, for it is coextensive with the right of local regulation and control, and its extent must always be tested by the state constitution.—*Attorney-General v. Lowrey*, 131 Mich. 639, 92 N. W. 289.

[7] Constitutionality of appointment of local officers by state officers.

A statute creating a superintendent of elections for a district comprising the counties of New York, Kings, Queens, Richmond and Westchester, and vesting the appointing power in the governor, does not violate the "home rule" clause of the N. Y. Constitution, since the office of superintendent of elections is not a constitutional office and the essential functions were unknown at the time the N. Y. Constitution was adopted.—*Matter of Morgan v. Furey*, 186 N. Y. 202, 78 N. E. 869.

A local office created since the adoption of the N. Y. Constitution of 1846, may be filled in such manner as the legislature may direct.—*Matter of Allison v. Welde*, 172 N. Y. 421, 65 N. E. 263, revg. s. c. 72 App. Div. (N. Y.) 629, 76 N. Y. Supp. 1008; *People ex rel. Taylor v. Dunlap*, 66 N. Y. 162.

An act transferring the appointment of the Commissioner of Jurors of Kings County, a county office at the time of the adoption of the N. Y. Constitution, from the local authorities to the justices of the Appellate Division, and hence to state officers, is unconstitutional and void.—*Matter of Brenner*, 170 N. Y. 185, 63 N. E. 133, affg. s. c. 67 App. Div. (N. Y.) 375, 73 N. Y. Supp. 689.

L. 1901, ch. 89, creating a commission for the erection of a new court-house in Oneida County, is not unconstitutional as a violation of N. Y. Const., Art. 10, § 2, which provides that county, city and town officers, whose election or appointment is not provided for by the Constitution, shall be elected by the electors of such county, city or town,

and that all other officers whose election or appointment is not provided for by the Constitution shall be elected or appointed as the legislature shall direct.—*People ex rel. Comrs. v. Supervisors*, 170 N. Y. 105, 62 N. E. 1092.

A state act providing for the election or appointment of local officers is not unconstitutional where it appears that prior to 1846 there were no city officers with the powers or even substantial functions devolving upon these officers.—*New York Fire Dept. v. Atlas Ss. Co.*, 106 N. Y. 566, 13 N. E. 329.

L. 1884, ch. 552, which extends the jurisdiction of the New York city department of parks over territory in Westchester county, is not in violation of N. Y. Const., Art. X, § 2, which preserves to counties, cities, town and villages the right to elect their own local officers or to have them appointed by some local authority, since no official of Westchester county is legislated out of office, nor are the powers and duties of any such official curtailed or bestowed upon another.—*Matter of Mayor*, 99 N. Y. 569, 2 N. E. 642.

An act creating the Rensselaer police district and placing it in charge of commissioners appointed by the state rather than the local authorities, is unconstitutional, as an unnecessary interference with rights of local self-government.—*People ex rel. Bolton v. Albertson*, 55 N. Y. 50.

C. was elected collector of taxes of a town for one year, but before he qualified or entered upon the discharge of his duties, the office of collector of taxes of that town was abolished and all provisions of statute affecting the duties of the office were abrogated and annulled by the act. By the same act the office of receiver of taxes of said town was established and said C. was designated as receiver for a period of three years. The powers and duties of the new officer were substantially the same as those of the old collectors. Action was brought to oust C. from office on the ground that the statute, in so far as it pertains to the appointment of C., was unconstitutional. The judgment of ouster was sustained.—*People ex rel. Lord v. Crooks*, 53 N. Y. 648.

When the legislature creates new civil divisions of the state, embracing the whole or parts of different counties, the officers over such newly created district may legally be appointed by the governor and senate.—*Metropolitan Board of Health v. Heister*, 37 N. Y. 661.

A statute making commissioners of taxes appointable by the governor is unconstitutional, as it vests in a state officer the power to appoint a local officer whose duties and functions had been exercised by city officers previous to the adoption of the Constitution.—*People v. Raymond*, 37 N. Y. 428.

It is not enough that the name of an officer is changed or his powers enlarged, to authorize the legislature to confer upon the governor the appointment of officers to discharge the duties performed by a city officer at the adoption of the N. Y. Constitution.—*People v. Raymond*, 37 N. Y. 428.

It would not be competent for the legislature to create a new civil division of the state and abrogate the local offices of the several counties that might compose it, and direct the appointment by the governor and senate of other officers limited to perform the same local functions only, although distinguished by new and more extended titles. It is therefore, essential, in order to justify their appointment by the governor and senate, that the metropolitan fire commissioners should be, under the act, officers of a new civil division or district of the state, created for general permanent purposes of government in substance and fact, as well as in name.—*People v. Pinckney*, 32 N. Y. 377.

New York Const. of 1846, Art. X, § 2, leaves the legislature free to provide, as it sees fit, for the election or appointment of all officers, local or general, thereafter created by law.—*People ex rel. Wood v. Draper*, 15 N. Y. 532.

N. Y. Const., Art. X, § 2, relates only to such offices as existed at the time the Constitution took effect, and does not apply to an office which the legislature, in providing for the accomplishment of a particular object within its authority, creates for the performance of a specific duty which might have been performed by a city or town officer.—*Syracuse v. Hubbard*, 64 App. Div. (N. Y.) 587, 72 N. Y. Supp. 802.

L. 1897, ch. 286, providing that in certain towns any five or more persons owning land abutting on a highway might petition the Supreme Court for the appointment of commissioners for the purpose of widening and improving the highway, is considered by Cullen, J., to be in violation of Const., Art. II, § 10, relative to the appointment of local officers.—*Matter of Henneberger*, 25 App. Div. (N. Y.) 164, 49 N. Y. Sup. 230.

[8] When a carrier is doing business within a district.

A railroad company which has no tracks within a district is not doing business therein in the sense that liability for service is incurred because it hires an office and agent to solicit freight and passenger traffic.—*Green v. C. B. & Q. R. Co.*, 205 U. S. 530, 27 Sup. Ct. R. (U. S.) 594.

§ 6. Counsel to the commissions * [Power to appoint assistants].—Each commission shall appoint as counsel to the commission an attorney and counselor-at-law of the state of New

* Words in brackets are not a part of section heading as enacted.—Ed.

York, who shall hold office during the pleasure of the commission. Each counsel to the commission shall, subject to the approval of the commission, have the power to appoint, and at pleasure remove, attorneys and counselors-at-law, to assist him in the performance of his duties, and also to employ and remove stenographers and process-servers.

Power of Interstate Commerce Commission to employ special counsel,—see Inters. Com. Act, § 16, post, Appendix B.

Constitutional provisions as to appointment and removal of employees,—see N. Y. Const., Art. V, § 9.

Corporation Counsel of New York City, the counsel to Board of Rapid Transit Commissioners,—see N. Y. Rap. Tr. Act, § 9, post, Appendix A.

Eligibility of counsel to the Commission,—see post, § 9.

Duties of counsel to the Commission, in general,—see post, § 12.

Salary of counsel to the Commission,—see post, §§ 13, 14.

Certain acts defined as grounds for removal of counsel to the Commission,—see post, § 15.

§ 7. Secretary to the commissions.—Each commission shall have a secretary to be appointed by it and to hold office during its pleasure. It shall be the duty of the secretary to keep a full and true record of all proceedings of the commission, of all books, maps, documents and papers ordered filed by the commission and of all orders made by a commissioner and of all orders made by the commission or approved and confirmed by it and ordered filed, and he shall be responsible to the commission for the safe custody and preservation of all such documents at its office. Under the direction of the commission the secretary shall have general charge of its office, superintend its clerical business and perform such other duties as the commission may prescribe. He shall have power and authority to administer oaths in all parts of the state, so far as the exercise of such power is properly incidental to the performance of his duty or that of the commission. The secretary shall designate from time to time, one of the clerks appointed by the commission to perform the duties of secretary during his absence and, during such time, the clerk so designated shall at the office possess the powers of the secretary of the commission.

Appointment of secretary to Interstate Commerce Commission,—see Inters. Com. Act, § 18, post, Appendix B.

Provisions as to secretary of former Board of Railroad Commissioners,—see N. Y. R. R. L., § 152.

Eligibility of secretary to the Commission,—see post, § 9.

Duties of secretary concerning the offices of Commission,—see post, § 10.

Salary of secretary to the Commission,—see post, §§ 13, 14.

Certain acts defined as grounds for removal of secretary,—see post, § 15.

Secretary may sign and issue subpoenas for the Commission,—see post, § 19.

Books and records of former Board of Railroad Commissioners, Board of Rapid Transit Railroad Commissioners, Commission of Gas and Electricity, and the Inspector of Gas Meters, transferred to the Public Service Commissions,—see post, § 84.

Secretaries to the Nebraska Board of Transportation are not executive state officers, but mere deputies, to act for their principals in matters that precede and lead to a final order or decision, which must be by their principals.—*Pacific Exp. Co. v. Cornell*, 59 Neb. 364, 81 N. W. 377.

§ 8. Additional officers and employees.—Each commission shall have power to employ, during its pleasure, such officers, clerks, inspectors, experts and employees as it may deem to be necessary to carry out the provisions of this act, or to perform the duties and exercise the powers conferred by law upon the commission.

Power of Interstate Commerce Commission as to employees,—see Inters. Com. Act, § 18, post, Appendix B.

Rules and regulations governing the appointment and removal of employees,—see N. Y. Civil Service Law (L. 1899, ch. 370) and the rules of the N. Y. State Civil Service Commission.

Constitutional provisions as to appointment and removal of subordinate officers,—see N. Y. Const., Art. V, § 19.

Power of former Gas and Electricity Commission to appoint subordinate officers,—see N. Y. Gas & El. Com. Act, § 7.

Power of former Board of Rapid Transit Railroad Commissioners to employ officers, clerks, etc.,—see N. Y. Rap. Tr. Act, § 9, post, Appendix A.

Power of former State Board of Railroad Commissioners to appoint subordinate officers.—see N. Y. R. R. L., § 153.

Eligibility of officers and employees of Commissions,—see post, § 9.

Payment of salaries and expenses of officers and employees,—see post, §§ 13, 14.

Every person employed by a Commission is a public officer,—see post, § 15.

Certain acts defined as grounds for removal of officers and employees of Commissions,—see post, § 15.

All persons employed by Board of Rapid Transit Railroad Commissioners at the passage of this Act are eligible for transfer and appointment to positions under the Public Service Commission of the first district,—see post, § 84.

Retaining in employment persons employed by former Board of Rapid Transit Commissioners,—see post, § 84, note.

Where a commissioner has the power to discharge subordinates at will, no form of words is necessary to accomplish that result. If he intends to and does communicate to the employee the fact that his services are no longer required and this is so understood by both parties, a discharge is effected.—*Wardlaw v. Mayor*, 137 N. Y. 194, 33 N. E. 140.

The power vested in an executive officer to investigate, etc., authorizes the employment of clerks, expert accountants, and other subordinates, and makes the expenses thereof a legitimate public obligation.—*Attorney-General v. Jochim*, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699.

“As to future employees of the [Public Service] Commission, they are under the jurisdiction of the State Civil Service Commission.”—*Opinion of Corporation Counsel F. K. Pendleton*, rendered to Comptroller H. A. Metz, July 13, 1907.

§ 9. Oath of office; eligibility of commissioners and officers.—Each commissioner and each person appointed to office by a commission or by counsel to a commission shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office. No person shall be eligible for appointment or shall hold the office of commissioner or be appointed by a commission or by counsel to a commission to, or hold, any office or position under a commission, who holds any official relation to any common carrier, railroad corporation, street railroad corporation, gas corporation or electrical corporation subject to the provisions of this act, or who owns stocks or bonds therein.

Qualifications of members of Interstate Commerce Commission,—see Inters. Com. Act, §§ 11, 24, post, Appendix B.

Eligibility for appointment to former Commission of Gas and Electricity, and provisions as to oath of office,—see N. Y. Gas & El. Com. Act, § 4.

Eligibility for appointment to former Board of Railroad Commissioners and provisions as to taking of oath of office,—see N. Y. R. R. L., § 154.

Provisions as to taking of oath by members of former Board of Rapid Transit Railroad Commissioners,—see N. Y. Rap. Tr. Com. Act, § 2, post, Appendix A.

Commissioners shall be residents of the district from which they are appointed,—see ante, § 4.

Certain acts by commissioners and officers forbidden,—see post, § 15.

Failure to take the oath of office required by law does not create a vacancy in the office, but at the utmost only furnishes a cause for forfeiture, and a vacancy can only be created by a direct proceeding for that purpose.—*Cronin v. Stoddard*, 97 N. Y. 271; *People ex rel. Wilson v. Trustees*, 59 Hun (N. Y.), 204, 13 N. Y. Supp. 447; *affd.* 128 N. Y. 657, 29 N. E. 148.

The failure of election officers to take a valid oath does not vitiate an election conducted by them, as acts of public officers being in office by color of election or appointment are valid, so far as the public is concerned.—*People v. Cook*, 8 N. Y. 67.

An oath of office, taken by a person duly chosen to the office, is, apparently, not open to the objection that it was filed, too late, if filed at any time before proceedings are taken to declare a vacancy in the office.—*People ex rel. Brooks v. Watts*, 73 Hun (N. Y.), 404, 26 N. Y. Supp. 281.

A defect in the oath of office, or delay in the filing thereof, apparently does not create a vacancy in the office, which can be effected only by a direct proceeding for the purpose.—*People ex rel. Brooks v. Watts*, 73 Hun (N. Y.), 404, 26 N. Y. Supp. 281.

§ 10. Offices of commissions; meetings; official seal; stationery, etc.—1. The principal office of the commission of the first district shall be in the borough of Manhattan, city of New York; and the office of the second district shall be in the city of Albany, in rooms designated by the trustees of public buildings. Each commission shall hold stated meetings at least once a month during the year at its office. Each shall have an official seal to be furnished and prepared by the secretary of state as provided by law. The offices shall be supplied with all necessary books, maps, charts, stationery, office furniture, telephone and telegraph connections and all other necessary appliances, to be paid for in the same manner as other expenses authorized by this act.

2. The offices of each commission shall be open for business between the hours of eight o'clock in the morning and eleven o'clock at night every day in the year, and one or more responsible persons, to be designated by the commission or by the secretary under the direction of the commission, shall be on duty at all times in immediate charge thereof.

Parallel provisions as to Interstate Commerce Commission,—see Inters. Com. Act, §§ 18, 19, post, Appendix B.

When a certified copy of a record or other paper must, in order to be evidence, be attested by a seal,—see N. Y. Code of Civil Procedure, §§ 957, 958.

Parallel provisions as to former Commission of Gas and Electricity,—see N. Y. Gas & El. Com. Act, § 55.

The trustees of public buildings are the governor, lieutenant governor and speaker of the Assembly,—see N. Y. Public Buildings Law (L. 1893, ch. 227), § 2.

For description of official seal of state officers,—see N. Y. Public Officers Law (L. 1892, ch. 681), § 40.

Parallel provisions as to former Board of Railroad Commissioners,—see N. Y. R. R. L., § 155.

Provisions as to seal and records of former Board of Rapid Transit Railroad Commissioners,—see N. Y. Rap. Tr. Act, § 3, post, Appendix A.

Provisions as to offices of former Board of Rapid Transit Railroad Commissioners,—see N. Y. Rap. Tr. Act, § 9, post, Appendix A.

Payment of the expenses of the Commissions,—see post, §§ 13, 14.

Leases of premises occupied by former Board of Rapid Transit Railroad Commissioners to be transferred to Public Service Commission,—see post, § 84, note.

§ 11. Quorum; powers of a commissioner.—A majority of the commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty or for the exercise of any power of the commission, and may hold meetings of the commission at any time or place within the state. Any investigation, inquiry or hearing which either commission has power to undertake or to hold may be undertaken or held by or before any commissioner. All investigations, inquiries, hearings and decisions of a commissioner shall be and be deemed to be the investigations, inquiries, hearings and decisions of the commission and every order

made by a commissioner, when approved and confirmed by the commission and ordered filed in its office, shall be and be deemed to be the order of the commission.

What constitutes a quorum for transaction of business by Interstate Commerce Commission,—see Inters. Com. Act, § 17, post, Appendix B.

Power of one or more Interstate Commerce Commissioners to prosecute inquiries,—see Inters. Com. Act, § 19, post, Appendix B.

For parallel provisions relating to former Commission of Gas and Electricity,—see N. Y. Gas & El. Com. Act, § 6.

Parallel provisions as to former Board of Railroad Commissioners,—see N. Y. R. R. L., § 156.

What constituted a quorum for transaction of business by former Board of Rapid Transit Railroad Commissioners,—see N. Y. Rap. Tr. Act, § 3, post, Appendix A.

Powers of Commission to conduct investigations,—see also, post, § 45.

Procedure upon investigation by Commission,—see also post, §§ 20, 48.

In the exercise of public authority, whether ministerial or judicial, all the persons to whom it is committed must confer and act together, as to a matter involving judgment or discretion, unless there be a provision that a less number may proceed.—*Powell v. Tuttle*, 3 N. Y. 396.

§ 12. Counsel to the commissions; duties.—It shall be the duty of counsel to a commission to represent and appear for the people of the state of New York and the commission, in all actions and proceedings involving any question under this act, or under or in reference to any act or order of the commission, and, if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute all actions and proceedings directed or authorized by the commission, and to expedite in every way possible final determination of all such actions and proceedings; to advise the commission and each commissioner when so requested in regard to all matters in connection with the powers and duties of the commission and of the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him.

Appearance of Corporation Counsel for former Board of Rapid Transit Railroad Commissioners,—see N. Y. Rap. Tr. Act, §§ 41, 62, post, Appendix A.

Corporation Counsel required to approve as to form, contracts made by former Board of Rapid Transit Railroad Commissioners,—see L. 1894, ch. 752, § 13, post, Appendix A.

Counsel may obtain preference on court calendar for any action or proceeding in which he appears or is allowed to intervene,—see post, § 21.

Summary proceedings by counsel to enforce orders of the Commission,—see post, §§ 57, 74.

Laws of 1894, ch. 752, § 13, required that corporation counsel should approve as to form contracts made by the Board of Rapid Transit Railroad Commissioners. It has been decided by the Counsel to the Public Service Commission of the First District that the Corporation Counsel of New York City must approve contracts made by the Public Service Commission of that district in the exercise of powers transferred to it from the former Board of Rapid Transit Railroad Commissioners.—[Ed.]

The rule that a board exercising judicial functions conferred by statute has no interest in maintaining its decision, and hence has no right to appear by counsel on appeal therefrom, applies to review of the decision of the N. Y. Board of Railroad Commissioners granting a certificate of public convenience and necessity.—*People ex rel. Steward v. Board of R. R. Comrs.*, 160 N. Y. 202, 54 N. E. 697, affg. s. c. 40 App. Div. (N. Y.) 559, 58 N. Y. Supp. 94.

§ 13. Salaries and expenses.—The annual salary of each commissioner shall be fifteen thousand dollars (\$15,000). The annual salary of counsel to a commission shall be ten thousand dollars (\$10,000). The annual salary of a secretary to a commission shall be six thousand dollars (\$6,000). All officers, clerks, inspectors, experts and employees of a commission, and all persons appointed by the counsel to a commission, shall receive the compensation fixed by the commission.

The commissioners, counsel to the commission and the secretary, and their officers, clerks, inspectors, experts and other employees, shall have reimbursed to them all actual and necessary traveling and other expenses and disbursements incurred or made by them in the discharge of their official duties.

Parallel provisions of Interstate Commerce Act,—see Inters. Com. Act, § 18, post, Appendix B.

As to salaries and expenses of former Commissioners of Gas and Electricity and their employees,—see N. Y. Gas & El. Com. Act, § 8.

As to salaries and expenses of members of former Board of Railroad Commissioners and their employees,—see N. Y. R. R. L., § 169.

Provisions as to salary of Rapid Transit Railroad Commissioners and their subordinate officers,—see N. Y. Rap. Tr. Act, §§ 10, 62, post, Appendix A.

An assignment by a public officer of his unearned salary or fee is contrary to public policy and void.—*Bowery N. Bank v. Wilson*, 122 N. Y. 478, 25 N. E. 855, 9 L. R. A. 706, revg. s. c. 1 N. Y. Supp. 473.

§ 14. Payment of salaries and expenses.—1. The salaries of the commissioners, the counsel to the commission, and the secretary to the commission in the first district shall be audited and allowed by the state comptroller, and paid monthly by the state treasurer upon the order of the comptroller out of the funds provided therefor. All other salaries and expenses of the commission of the first district shall be audited and paid as follows: The board of estimate and apportionment of the city of New York, or other board or public body on which is imposed the duty and in which is vested the power of making appropriations of public moneys for the purposes of the city government shall, from time to time, on requisition duly made by the public service commission of the first district, appropriate such sum or sums of money as may be requisite and necessary to enable it to do and perform, or cause to be done and performed, the duties in this or in any other act prescribed, and to provide for the expenses and the compensation of the employees of such commission, and such appropriation shall be made forthwith upon presentation of a requisition from the said commission, which shall state the purposes for which such moneys are required by it. In case the said board of estimate and apportionment, or such other board or public body, fail to appropriate such amount as the said commission deems requisite and necessary, the said commission may apply to the appellate division of the supreme court in the first department, on notice to the board of estimate and apportionment or such other board or public body aforesaid, to determine what amount shall be appropriated for the purposes so required and the decision of said appellate division shall be final and conclusive; and the city shall not be liable for any indebtedness incurred by the said commission in excess of such appropriation or appropriations. It shall be the duty of the auditor and comptroller of said city, after such appropriation shall have been duly made, to audit and pay the proper expenses and compensation of the employees of said commission other than its counsel and secretary, upon vouchers therefor, to

be furnished by the said commission, which payments shall be made in like manner as payments are now made by the auditor, comptroller or other public officers of claims against and demands upon such city; and for the purpose of providing funds with which to pay the said sums, the comptroller or other chief financial officer of said city, is hereby authorized and directed to issue and sell revenue bonds of such city in anticipation of receipt of taxes and out of the proceeds of such bonds to make the payments in this section required to be made. The amount necessary to pay the principal and interest of such bonds shall be included in the estimates of moneys necessary to be raised by taxation to carry on the business of said city, and shall be made a part of the tax levy for the year next following the year in which such appropriations are made. The commission may provide that all or any portion of the expenses so incurred and paid by said city as in this section provided, and for which said city shall be liable, shall be repaid, with interest, by the bidder or bidders at the public sale of the rights, privileges and franchises, as provided in chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants," and the acts amendatory thereto. The said comptroller shall pay the proper salaries and the expenses of the said commission upon its requisition, for the remainder of the fiscal year after this act shall take effect, from any funds that may have been heretofore appropriated for the board of rapid transit railroad commissioners, which appropriation is hereby transferred to the credit of the public service commission of the first district. In case the said appropriation shall not be sufficient to meet such salaries and expenses, the comptroller of said city is hereby authorized and directed to issue and sell revenue bonds of said city, in anticipation of receipt of taxes, as hereinbefore provided.

2. All salaries and expenses of the commission in the second district shall be audited and allowed by the state comptroller and paid monthly by the state treasurer upon the order of the comptroller, out of the funds provided therefor.

Parallel provisions as to former Board of Railroad Commissioners,—see N. Y. R. R. L., §§ 169, 170.

For practically identical provisions with reference to the payment of salaries and expenses of the former Board of Rapid Transit Railroad Commissioners,—see N. Y. Rap. Tr. Act, §§ 10, 62, post, Appendix A.

Appropriation for payment of expenses of Commissions,—see post, § 88.

General rules of statutory construction.—see ante, § 1, notes [23]–[40].

[1] Power of legislature to compel expenditures.

It is within the power of a state legislature to create special taxing districts and to charge the cost of a local improvement, in whole or in part, upon the property of said district.—*Cleveland, C. C. & St. L. R. Co. v. Porter*, 210 U. S. 177, 28 Sup. Ct. R. (U. S.) 647, affg. s. c. 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179.

An act of a state legislature making a certain bridge and causeway a free public highway, providing for the condemnation of the franchise and property of the company operating said bridge and for the apporportioning of the damages against certain benefited towns, is valid.—*Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. R. (U. S.) 617, affg. s. c. 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465n.

Municipal corporations are creatures of the state, and exist and act in subordination to the sovereign power. The legislature may determine what moneys they may raise and expend, and what taxation for municipal purposes may be imposed, and it does not exceed its constitutional authority when it compels a municipality to pay a debt which has some meritorious basis to rest on.—*Mayor v. Tenth National Bank*, 111 N. Y. 446, 18 N. E. 618.

A statute directing the construction of highways in a certain town and imposing a tax upon that town to pay the expenses of the work is within the power of the legislature. That local expenditures and improvements should, in general, be left to the discretion of the locality, is manifestly just and in accordance with the theory of our government, but when power is conceded, the courts have no right to inquire into the motives and reasons for doing the particular act.—*People ex rel. McLean v. Flagg*, 46 N. Y. 401.

[2] What constitutes a city purpose.

The construction, management and control of rapid transit railways by a municipality is "a city purpose."—*Sun Publishing Assn. v. Mayor*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788, affg. s. c. 8 App. Div. (N. Y.) 230, 40 N. Y. Supp. 607.

When the legislature authorizes an expenditure for some public improvement, it is the exclusive judge of its propriety and utility.—*Waterloo W. M. Co. v. Shanahan*, 128 N. Y. 345, 28 N. E. 358, 14 L. R. A. 481.

As the dividing line between what is a municipal purpose and what is not, is in many cases doubtful and uncertain, great weight should be given by the courts to the legislative determination, and its action should not be annulled unless the purpose appears clearly to be one not authorized.—*People ex rel. Murphy v. Kelly*, 76 N. Y. 475.

The legislative determination as to what is a municipal purpose will not be annulled by the courts in any doubtful case, but only where it

appears to be clearly erroneous.—*People ex rel. Murphy v. Kelly*, 76 N. Y. 475.

Any doubt whether a given expenditure is for a city purpose must be resolved in favor of the legislative action.—*Sun Publishing Assn. v. Mayor*, 8 App. Div. (N. Y.) 230, 40 N. Y. Supp. 607; *affd.* 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788.

“Section 10 of Art. VIII of the State Constitution provides in part as follows: ‘Nor shall any such county, city, town or village be allowed to incur any indebtedness, except for county, city, town or village purposes.’ The question which arises is, whether the payment of the expenses of the Commission of the First District by the Comptroller of the city of New York is for a city purpose. This is a question which merits a great deal of careful consideration and one which is not entirely free from doubt. I believe, however, that the courts will be inclined to follow the decision of the Court of Appeals in the *Sun Printing & Publishing Co. v. The Mayor, etc.*, 152 N. Y. 257 [46 N. E. 499, 37 L. R. A. 788]. It was there held that railroads being necessary for the common welfare of the people, required for their use and public in character, are for a ‘city purpose,’ within the meaning of the Constitution, when authorized by the legislature and constructed and owned by the city in whose territory they are located. If I understand the Public Service Commissions Law correctly, all the powers possessed by the Board of Rapid Transit Railroad Commissioners are transferred to and vested in the Public Service Commission in the First District. It would therefore follow, it seems to me, that any expenses incurred by the present Commission in carrying out the duties of the Rapid Transit Board were necessarily for a ‘city purpose.’ Assuming that the expenses to be incurred by the Commission are not for a ‘city purpose,’ a proposition which I do not decide, I know of no way at present in which the expenses of the Commission can be divided so as to show what are necessary for a ‘city purpose,’ and what are not. It seems to me, however, without directly passing upon the question, that the ruling of the Court of Appeals in the *Sun Printing & Publishing Association* case is sufficiently comprehensive to include the present situation. I have stated the effect of the *Sun Publishing Company* decision, but I have some doubt as to whether it is necessary to resort to that decision to meet the objection suggested under this section of the Constitution. The intent of the section was to prevent the giving of the money of municipal corporations for other than municipal purposes, and probably the real question to be solved under this point is whether the money to be raised by the city is to be used for a public purpose. That the purpose of the Public Utilities Act is public cannot be disputed.”—*Opinion of Corporation Counsel F. K. Pendleton*, rendered to Comptroller H. A. Metz, July 13, 1907.

[3] Discretion of paying officer as to payments duly audited.

The Comptroller of the United States, in passing upon vouchers duly itemized and approved by the chairman of the Interstate Commerce Commission, has not authority to inquire whether the expenses were necessary or the business charged for official. These were matters for the chairman of the Commission to determine.—*Mosely v. U. S.*, 35 Ct. Cl. (U. S.) 347.

An act declared that the expenses incurred by the commissioners of records should be paid by the county treasurer upon the certificate of the commissioners.—*Held*, that the legislative intent was to give them a large discretion in the performance of their duties and make them the sole judges and auditors of their own expenditures. The act being special, and to provide for a special service by an agency outside the ordinary city or county government of New York, it is not repealed in any of its provisions by implication, by general provisions for the government of the city or county, or for the auditing and paying of the ordinary expenses of the two governments.—*People ex rel. Kingsland v. Palmer*, 52 N. Y. 83.

[4] Application to appellate division.

“In my opinion, while this part of the Act [referring to so much of Public Service Commissions Law, § 14, as relates to the application to the Appellate Division of the Supreme Court] is of very doubtful validity, it is not necessary at this time to pass upon the question of its constitutionality. If the statute is otherwise good, this part, if bad, can be eliminated without destroying the entire fabric of the Act.”—*Opinion of Corporation Counsel F. K. Pendleton*, rendered to Comptroller H. A. Metz, July 13, 1907.

[5] Extent to which the city may be rendered liable.

The New York Rapid Transit Act is open to serious objection in that it imposes no limits on the amount for which the Board of Rapid Transit Commissioners could render the city liable.—*Matter of Rapid Transit Comrs.*, 5 App. Div. (N. Y.) 290, 39 N. Y. Supp. 750.

[6] Proposed expenditures must be at least approximately estimated.

The cost of a proposed rapid transit railway is a vital consideration, on the motion of the Board of Rapid Transit Commissioners favorable to the construction of such railway, and if the cost is not at least approximately estimated, the court will refuse to confirm the report.—*Matter of Rapid Transit Comrs.*, 5 App. Div. (N. Y.) 290, 39 N. Y. Supp. 750.

[7] Transfer of present funds.

“The funds heretofore appropriated for the Board of Rapid Transit Railroad Commissioners are by the Act [Public Service Commissions Law] transferred to the credit of the [Public Service] Commission and are available upon its requisition.”—*Opinion of Corporation Counsel F. K. Pendleton*, rendered to Comptroller H. A. Metz, July 13, 1907.

§ 15. Certain acts prohibited *[and defined as grounds for removal; employees of commissions declared to be public officers].—Every commissioner, counsel to a commission, the secretary of a commission, and every person employed or appointed to office, either by a commission or by the counsel to a commission, is hereby forbidden and prohibited to solicit, suggest, request or recommend, directly or indirectly, to any common carrier, railroad corporation or street railroad corporation, or to any officer, attorney, agent, or employee thereof, the appointment of any person to any office, place, position or employment. And every common carrier, railroad corporation, street railroad corporation, gas corporation and electrical corporation, and every officer, attorney, agent and employee thereof, is hereby forbidden and prohibited to offer to any commissioner, to counsel to a commission, to the secretary thereof, or to any person employed by a commission or by the counsel to a commission, any office, place, appointment or position, or to offer or give to any commissioner, to counsel to a commission, to the secretary thereof, or to any officer employed or appointed to office by the commission or by the counsel to the commission, any free pass or transportation or any reduction in fare to which the public generally are not entitled or free carriage for freight or property or any present, gift or gratuity of any kind. If any commissioner, counsel to a commission, the secretary thereof or any person employed or appointed to office by a commission or by counsel to a commission, shall violate any provision of this section he shall be removed from the office held by him. Every commissioner, counsel to the commission, the secretary thereof and every person employed or appointed to office by the commission or by counsel to the commission, shall be and be deemed to be a public officer.

* Words in brackets are not a part of section heading as enacted.—Ed.

Prohibition against receiving of passes, etc., by a public officer,—see N. Y. Const., Art. XIII, § 5.

Prohibition on members of former Board of Railroad Commissioners,—see N. Y. R. R. L., § 168.

Certain acts defined as denoting ineligibility of commissioners and employees of commission,—see ante, § 9.

The giving of free passes, generally,—see post, § 33.

Removal from office.—see ante, § 4, notes [6]–[13].

[1] Who are public officers.

Whoever has a public charge or employment, or even a particular employment affecting the public, holds a public office.—*Rowland v. Mayor*, 83 N. Y. 372.

“Public office,” in the constitutional sense, has respect to a permanent public trust or employment, to be exercised generally and in all proper cases. It does not include the appointment, to meet special exigencies, of an individual to perform transient, occasional or incidental duties such as ordinarily are performed by public officers.—*Matter of Hathaway*, 71 N. Y. 238.

Every officer who is appointed to discharge a public duty and receives compensation, is a public officer.—*People ex rel. Henry v. Nostrand*, 46 N. Y. 375; *Robinson v. Chamberlain*, 34 N. Y. 389; *People ex rel. Bradley v. Stevens*, 51 How. Pr. (N. Y.) 103; *People v. Hayes*, 7 How. Pr. (N. Y.) 248.

Where a person holds a position created by statute, with the appointing power designated, the salary fixed and the general duties prescribed by law, he is a public officer.—*Matter of Hardy*, 17 Misc. (N. Y.) 667, 41 N. Y. Supp. 469.

[2] Qualifications.

A statute of North Carolina providing that no railroad commissioner should be employed by or in any way interested in any carrier company, and providing that such relations should be a ground for his removal, is not unconstitutional because it requires of the railroad commissioners qualifications in addition to those prescribed in the state constitution.—*Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554.

[3] Receiving of free transportation.

A public officer who accepts the privilege of riding in a palace or sleeping-car accorded to him by a pass issued by the sleeping-car company, accepts a free pass within the meaning of N. Y. Const., Art. XIII, § 5, forbidding the receiving or using of passes by public officers.—*People v. Wadhams*, 176 N. Y. 9, 68 N. E. 65.

Even though a public officer rightfully held a free pass before the adoption of the provision of the N. Y. Constitution forbidding the receiving or using of passes by public officers, that provision makes it unlawful for him to thereafter use the said pass.—*People v. Rathbone*, 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384.

N. Y. Const., Art. XIII, § 5, prohibits officers and representatives of the State Board of Railroad Commissioners from accepting free passes from a railroad, but not from the Secretary of State for their transportation while engaged in public business.—*Matter of R. R. Comrs.*, 11 Misc. (N. Y.) 103, 32 N. Y. Supp. 1115.

§ 16. Annual report of commissions.—All proceedings of each commission and all documents and records in its possession shall be public records, and each commission shall make an annual report to the legislature on or before the second Monday of January in each year, which shall contain copies of all orders issued by it, and any information in the possession of the commission which it shall deem of value to the legislature and the people of the state. Five hundred copies of each report, together with abstracts of the reports to such commission of common carriers, railroad corporations and street railroad corporations, and gas and electrical corporations, in addition to the regular number prescribed by law, shall be printed as a public document of the state, bound in cloth, for the use of the commissioners and to be distributed by them in their discretion to railroad, street railroad, gas and electrical corporations and other persons interested therein.

Annual reports of Interstate Commerce Commission,—see Interst. Com. Act, § 21, post, Appendix B.

Former Board of Railroad Commissioners not required to give publicity to information, contracts, agreements and leases required to be furnished by railroads,—see N. Y. R. R. L., § 163.

Annual reports of former Board of Railroad Commissioners,—see N. Y. R. R. L., § 166.

Annual reports of corporations subject to this Act,—see post, §§ 46, 66.

Annual report of Commission may recommend legislation deemed wise in the public interest,—see post, § 45.

A report of a railroad commission to the governor may be used against it on an application by it to secure compliance with one of its

orders.—*Seaboard Air L. R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, affg. s. c. 48 Fla. 129, 37 So. 314, 48 Fla. 150, 37 So. 658.

Upon an application for an order for the inspection of the record of assessed valuations, it is proper to limit the inspection to the assessments affecting the petitioner personally and his clients.—*Matter of Lord*, 167 N. Y. 398, 60 N. E. 748, affg. 59 App. Div. (N. Y.) 591, 69 N. Y. Supp. 678.

For various definitions of the word "document," see *Hayden v. Van Cortlandt*, 84 Hun (N. Y.) 150, 32 N. Y. Supp. 507.

A corporator of a municipal corporation has the right to inspect and take copies of the contracts for public works of the municipality without showing any private personal interest in such documents because everybody has a right to see the public records of the corporation.—*People ex rel. Henry v. Cornell*, 47 Barb. (N. Y.) 329, revd. without opinion, 35 How. Pr. (N. Y.) 31.

The fact that a statute required a report of the Railroad Commissioners to the legislature and authorized them to distribute printed copies thereof did not make such report evidence unless certified by a Commissioner or the secretary.—*Bella v. New York, L. & W. R. Co.*, 24 N. Y. S. R. 921, 6 N. Y. Supp. 552.

A document is defined as "an instrument upon which is recorded by means of letters, figures or marks, matter which may eventually be used."—*Johnson Street R. Co. v. North Branch Steel Co.*, 48 Fed. 190.

It is not the unqualified right of every citizen to demand access to, and inspection of, the works and documents of a public office. The individual demanding an inspection must have an interest in the document. An inspection will not be granted to gratify curiosity.—*Randolph v. State*, 82 Ala. 527, 2 So. 714; *Brewer v. Watson*, 71 Ala. 299.

Any person interested in what a public record shows has the right to inspect but not to handle or touch the same.—*Keefe v. Donnell*, 92 Me. 151, 42 Atl. 345.

All the people have a right of free access to, and public inspection of, public records, and the citizen who wishes to make such inspection need not show some special interest in such record.—*Burton v. Tuite*, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73.

Every person is entitled to the inspection of public documents if he shows the requisite interest therein. The common interest which every citizen has in the enforcement of the laws of the community where he dwells is sufficient.—*State ex rel. Ferry v. Williams*, 41 N. J. L. 332.

All persons have the right to know the contents of public records and to make an inspection thereof.—*Newton v. Fischer*, 98 N. C. 20, 3 S. E. 822.

The stock ledger or transfer book of a corporation is a document.—*Clark v. Rhode Island Locomotive Works*, 24 R. I. 307, 53 Atl. 47.

The record book of a corporation is a "document"—*Arnold v. Pawtuxet Val. Water Co.*, 18 R. I. 189; 26 Atl. 55, 19 L. R. A. 602.

It is the duty of public officers to allow all persons interested to inspect and to make copies of public records and this duty may be enforced by mandamus.—*Clay v. Ballard*, 87 Va. 787, 13 S. E. 262.

§ 17. Certified copies of papers filed to be evidence.

—Copies of all official documents and orders filed or deposited according to law in the office of either commission, certified by a commissioner or by the secretary of the commission to be true copies of the originals, under the official seal of the commission, shall be evidence in like manner as the originals.

For similar provisions as to Interstate Commerce Commission,—see Interst. Com. Act, § 16, post, Appendix B.

For similar provision,—see N. Y. Code of Civil Procedure, § 933.

For practically identical provisions as to former Board of Railroad Commissioners,—see N. Y. R. R. L, § 167.

A statute authorizing the receipt in evidence of certified copies of papers filed, kept or recorded pursuant to law in a public office does not make such copies evidence unless the originals if produced would be competent.—*Donohue v. Whitney*, 133 N. Y. 178, 30 N. E. 848.

Certified copies of papers in a public office are not evidence where the seal is omitted.—*City of New York v. Vanderveer*, 91 App. Div. (N. Y.) 303, 86 N. Y. Supp. 659.

In order that certified copies of papers filed or recorded in a public office may be evidence there must be some law which authorizes the filing or recording of the originals.—*Polykranas v. Krausz*, 73 App. Div. (N. Y.) 533; 77 N. Y. Supp. 46.

A certified copy of a record of a power of attorney is not evidence unless there is a statute providing for the recording of such a paper.—*Striker v. Striker*, 31 App. Div. (N. Y.) 129, 52 N. Y. Supp. 729.

The minutes of the proceedings of a town board are not required by law to be filed in the town clerk's office and they are not therefore competent evidence under the statute which makes papers filed pursuant to law, evidence.—*Jackson v. Collins*, 62 Hun (N. Y.), 618, 16 N. Y. Supp. 651, 41 N. Y. S. R. 590.

Reports of the N. Y. Board of Railroad Commissioners were not admissible in evidence unless certified by a member of the Board or his

secretary.—*Bella v. New York, L. & W. R. Co.*, 24 N. Y. S. R. 921, 6 N. Y. Supp. 552.

§ 18. Fees to be charged and collected by the commissions.—Each commission shall charge and collect the following fees: For copies of papers and records not required to be certified or otherwise authenticated by the commission, ten cents for each folio; for certified copies of official documents and orders filed in its office, fifteen cents for each folio, and one dollar for every certificate under seal affixed thereto; for certifying a copy of any report made by a corporation to the commission, two dollars; for each certified copy of the annual report of the commission, one dollar and fifty cents; for certified copies of evidence and proceedings before the commission, fifteen cents for each folio. No fees shall be charged or collected for copies of papers, records or official documents, furnished to public officers for use in their official capacity, or for the annual reports of the commission in the ordinary course of distribution. All fees charged and collected by the commission of the first district shall belong to the city of New York, and shall be paid monthly, accompanied by a detailed statement thereof, into the treasury of the city to the credit of the general fund, and all fees charged and collected by the commission of the second district shall belong to the people of the state, and shall be paid monthly, accompanied by a detailed statement thereof, into the treasury of the state to the credit of the general fund.

For practically identical provisions as to fees charged by former Board of Railroad Commissioners,—see N. Y. R. R. L., § 165.

§ 19. Attendance of witnesses and their fees; * [procedure in punishing for contempt].—1. All subpoenas shall be signed and issued by a commissioner or by the secretary of a commission and may be served by any person of full age. The fees of witnesses required to attend before a commission, or a commissioner, shall be two dollars for each day's attendance, and five cents for every mile of travel by the nearest generally traveled route in going to and from the place where attendance of the witness is required, such fees to be paid when the witness is excused from further attendance; and the disbursements made in the payment of such fees shall be audited and paid in the first district in the same manner provided for the payment of expenses of the commission.

* Words in brackets are not a part of section heading as enacted.—Ed.

2. If a person subpoenaed to attend before a commission, or a commissioner fails to obey the command of such subpoena, without reasonable cause, or if a person in attendance before a commission, or commissioner, shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or papers, when ordered so to do by the commission, or a commissioner, or to subscribe and swear to his deposition after it has been correctly reduced to writing, he shall be guilty of a misdemeanor and may be prosecuted therefor in any court of competent criminal jurisdiction.

If a person in attendance before a commission or a commissioner refuses without reasonable cause to be examined or to answer a legal and pertinent question or produce a book or paper, when ordered so to do by a commission or a commissioner, the commission may apply to any justice of the supreme court upon proof by affidavit of the facts for an order returnable in not less than two nor more than five days directing such person to show cause before the justice who made the order, or any other justice of the supreme court, why he should not be committed to jail; upon the return of such order the justice before whom the matter shall come on for hearing shall examine under oath such person whose testimony may be relevant, and such person shall be given an opportunity to be heard; and if the justice shall determine that such person has refused without reasonable cause or legal excuse to be examined, or to answer a legal and pertinent question, or to produce a book or paper which he was ordered to bring, he may forthwith, by warrant, commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law.

Compelling giving of testimony and production of books and papers in court proceedings to enforce adherence to published interstate rates,—see Elkins Act, § 3, post, Appendix B.

For provisions as to witnesses in attendance before Interstate Commerce Commission,—see Interst. Com. Act, § 12, post, Appendix B.

Provisions of N. Y. Code of Civil Procedure as to compelling attendance and testimony of witnesses in civil actions,—see N. Y. Code Civ. Pro., §§ 852–869.

Criminal contempts,—see N. Y. Penal Code, § 143.

For provisions as to attendance of witnesses before former Board of Railroad Commissioners, and fees for such attendance,—see N. Y. R. R. L., § 164.

Immunity of witnesses before Commission,—see post, § 20.

Power of each Commission and each commissioner to compel production of books, papers, etc.,—see also post, § 45, subd. 3.

Production of sworn copies in lieu of original books, papers, etc.,—see post, § 45, subd. 3.

Power of each Commission and each commissioner to subpoena witnesses, take testimony, administer oaths,—see also post, § 45, subd. 1, § 66, subd. 10.

General rules of statutory construction,—see ante, § 1, notes [23]—[40].

Immunity of witnesses,—see post, § 20, notes [2]—[9].

Immunity of witnesses as extending to production of books and papers,—see post, § 20, note [8].

[1] Where hearings will be held.

If the number of books, etc., asked for under a *subpoena duces tecum* is large, or other exceptional circumstances exist, the Interstate Commerce Commission will order the testimony to be taken at such a place as will avoid oppression in producing the books at a distant hearing, and expedite the progress of the investigation.—*Rice v. Cincinnati, W. & B. R. Co.*, 2 Inters. Com. R. 507, 584, 3 I. C. C. R. 186.

A case involving local rates will be heard by the Interstate Commerce Commission at some central point in the territory immediately affected.—*Delaware Grange v. N. Y. P. & N. R. Co.*, 1 Inters. Com. R. 649, 2 Inters. Com. R. 187, 799, 2 I. C. C. R. 309.

[2] Extent of visitorial powers.

A state has the undoubted right to inquire into all the business of a domestic railroad corporation, even though it be engaged in interstate commerce; but as to partnerships which engage in the business of carrier, the state has no such visitorial power, and can require information only as to the business carried on within the state.—*State v. U. S. Exp. Co.*, 81 Minn. 87, 83 N. W. 465, 50 L. R. A. 667.

[3] Form of application to compel production of books and papers.

See also, post, § 20, note [1].

In a proceeding before the North Dakota Commission as to the rates upon a certain railroad, the attorney-general as counsel to the Commission asked two witnesses, officers of the company, for certain relevant statistical data which could only have been prepared from

an actual examination of all the way bills of the company for four years, a task nearly if not quite equal to that of doing over again the entire accounting work for those years, entailing the employing of a large force of clerks, etc.—*Held*, that in order to sustain his request for this information, counsel must tender the company the probable expense of the labor entailed.—*Northern Pac. R. Co. v. Keyes*, 91 Fed. 47.

When in a proceeding between parties before the Interstate Commerce Commission, an application is made to compel the production of books, papers, etc., by one who is a party to the proceedings and a carrier engaged in interstate commerce, it is sufficient for the application to indicate in writing in a general way what books, etc., should be produced, and that there is reason to believe, and the applicant does believe, that in the course of the hearing they will become of service, on account of the light they will throw upon the questions in controversy. The applicant should make affidavit, as part of the application, that such application is made in good faith, and not for the purpose of harassing or vexing the carrier.—*Rice v. Cincinnati, W. & B. R. Co.*, 2 Inters. Com. R. 507, 584, 3 I. C. C. R. 186.

When in a proceeding between parties before the Interstate Commerce Commission, an application is made to compel the production of books, papers, etc., by persons not interstate carriers and strangers to the proceeding, the application should be in writing, addressed to the Commission, specifying as nearly as may be the books or documents desired, and be accompanied by an affidavit that the books, etc., desired are in the possession of the witness or under his control. The affidavit should also set forth facts making a very clear and full *prima facie* case that the books, etc., contain evidence material and necessary to the parties seeking their production.—*Rice v. Cincinnati, W. & B. R. Co.*, 2 Inters. Com. R. 507, 584, 3 I. C. C. R. 186.

[4] When a subpoena duces tecum will be refused.

A subpoena *duces tecum* will not be issued to third parties where it is clear that the proof desired can be secured in other ways.—*Haddock v. D. L. & W. R. Co.*, 3 Inters. Com. R. 123, 302, 4 I. C. C. R. 296.

[5] Relevancy as affecting compelling of testimony or production of documents.

Witnesses cannot plead the non-materiality or irrelevancy of testimony or books and papers, in order to be excused from testifying or from producing such data.—*Nelson v. U. S.*, 201 U. S. 92, 26 Sup. Ct. R. (U. S.) 358.

Discussion of what constitutes relevant testimony and papers, under the section of the Interstate Commerce Act authorizing the Circuit Court

to use its proceeds to compel the giving of testimony and the production of papers, etc.—*Interst. Com. Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. R. (U. S.) 563.

Where a court order calls for the production of certain books and papers by a corporation at a trial, they must be produced, but their relevancy and pertinency to the issues involved remains to be passed upon.—*International Coal M. Co. v. Pa. R. Co.*, 152 Fed. 557.

When the state has a legal right to call upon corporations or companies for information as to their business, they cannot be permitted to determine for themselves whether they will answer or not, for the reason that it is not possible for them to do so. It is their duty in such cases to answer candidly, so far as reasonably possible, and state the facts which they claim excuse them for not answering more fully.—*State v. U. S. Exp. Co.*, 81 Minn. 87, 83 N. W. 465, 50 L. R. A. 667.

[6] Production of books and papers by a corporation.

Whether immunity of witnesses extends to production of books and papers by corporation,—see post, § 20, note [8].

There can be no illegality in a statutory provision of a state that a corporation doing business within that state and protected by its powers may be compelled to produce before a state tribunal material evidence in the shape of books or papers kept by it in the state, and which are in its custody and control, although for the moment outside the borders of the state.—*Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. R. (U. S.) 178, affg. s. c. — Vt. —, 66 Atl. 790.

Whether a notice to produce books and papers is broader than the state statute providing therefor allows is a question of the construction of the said statute and of the notice, and the decision of state court on this question is final.—*Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. R. (U. S.) 178, affg. s. c. — Vt. —, 66 Atl. 790.

A notice to a rendering company to produce before the grand jury such books or papers as related to, or concerned any dealings or business between January 1, 1904 and the date of the notice, Oct., 1906, with the parties named therein who were state cattle commissioners charged before the grand jury with having unlawfully sold diseased meat for food purposes, is not void as lacking the necessary particularity of description of the documents required.—*Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. R. (U. S.) 178, affg. s. c. — Vt. —, 66 Atl. 790.

A notice to produce books and papers held not to amount to an unreasonable search and seizure of private books and documents.—*Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. R. (U. S.) 178, affg. s. c. — Vt. —, 66 Atl. 790.

Officers of a corporation cannot refuse to produce its books, papers, etc., on the ground that such documents are not under their control.—*Nelson v. U. S.*, 201 U. S. 92, 26 Sup. Ct. R. (U. S.) 358.

A corporation is entitled to protection against unreasonable searches and seizures of its books and papers, even under a subpoena *duces tecum* which is too broad and exacting in its mandates. Where an act of Congress does not authorize examination of any or all the books and papers of a corporation, a subpoena requiring production of practically all of them is unreasonable, as tending practically to stop the business of the corporation.—*Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. R. (U. S.) 370.

On an investigation by the Interstate Commerce Commission as to the reasonableness of rates for the transportation of coal, contracts between railroad companies and certain coal companies which proposed the building of a competing railroad, whereby the said railroad companies purchased the collieries, are relevant evidence and their production should be compelled.—*Interstate Com. Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. R. (U. S.) 563.

A subpoena *duces tecum* commanding an officer of a railroad company to produce all letters, papers, books and memoranda as to certain claims, is not objectionable for unreasonableness.—*Santa Fe Pac. R. Co. v. Davidson*, 149 Fed. 603.

The secretary of a corporation cannot personally be punished for contempt for failure to produce books and papers which his superiors have entrusted to some other officer, which have never been in his possession, and which he can not obtain except by a surreptitious attempt to get them from the president's desk, or by a breach of the peace. A subpoena should have been served upon the corporation itself, and it could claim no immunity.—*U. S. v. Am. Tobacco Co.*, No. 2, 146 Fed. 557.

A corporation may be subpoenaed to produce its books, papers, etc.—*U. S. v. Am. Tobacco Co.*, No. 2, 146 Fed. 557.

A subpoena *duces tecum* required a corporation to produce its minute books "from the time of its incorporation to the present day," a period of about three years, and its copy letter books for a period of about three months and a half.—*Held*, that such subpoena was not too broad and sweeping.—*U. S. v. Am. Tobacco Co.*, No. 1, 146 Fed. 557.

[7] Remedy for refusal of witness to give testimony.

In a proceeding before the North Dakota commission as to rates upon a railroad which was a foreign corporation, officers of the company, on the stand, declined to compile certain statistical tables desired by the Attorney-General as counsel of the commission. He thereupon moved to strike out of their testimony *in toto*.—*Held*, that this was not the remedy counsel should have pursued. If he was entitled to this evidence, and

the witnesses refused to furnish it, his proper remedy was to apply to the federal court of the district in which the testimony was taken, for process to compel its production.—*Northern Pac. R. Co. v. Keyes*, 91 Fed. 47.

[8] What bodies may be vested with power to punish for contempt.

Commissions as administrative bodies,—see ante, § 4, note [15].

Congress being vested with power to regulate commerce among the states, it may establish an administrative body to investigate such commerce, and vest that body with power to call witnesses before it and to require the production of books and papers relating to the subject. The inquiry whether a witness before the commission is bound to answer a question propounded or to produce books, papers, etc., called for by that body, is a function that cannot be committed to a subordinate administrative or executive tribunal for final determination. To give it power to punish disobedience to its subpoenas would not be consistent with due process of law or our system of government. The power, except in the particular cases enumerated in the U. S. Constitution, can be exerted only by a competent judicial tribunal. A petition by the Interstate Commerce Commission to the Circuit Court, under Interst. Com. Act, § 12, asking that court to use its process in compelling the giving of testimony and the production of books and papers before the Commission is a "case" or "controversy" to which the judicial power of the United States extends, under U. S. Const., Art. III, § 2, and that section does not impose on the courts duties not judicial in their nature, even though its effect is to aid an administrative body in the performance of its duties.—*Interst. Com. Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. R. (U. S.) 1125, revg. s. c. sub. nom. *In re Interst. Com. Commission*, 53 Fed. 476.

To punish for contempt is the highest exercise of judicial power, and belongs to judges of courts of record or superior courts. Where jurisdiction exists, there can be no review. This power is not an incident to the mere exercise of judicial functions, and cannot be upheld on inferences and implications, but must be expressly conferred by law.—*In re Mason*, 43 Fed. 510.

An act of the legislature authorizing an executive officer of the state to commit a person to jail for a contempt in refusing to obey his mandate, or refusing to answer questions propounded by him to a person called before him, is unconstitutional, as a warrant to enforce such a statute would not be due process of law.—*People ex rel. MacDonald v. Leubischer*, 34 App. Div. (N. Y.) 577, 54 N. Y. Supp. 869.

The power to punish for contempt is judicial in its nature, and only arises in a judicial proceeding and can be exercised under the law of

the land only by a competent judicial tribunal which has jurisdiction in the premises.—*People ex rel. MacDonald v. Leubischer*, 34 App. Div. (N. Y.) 577, 54 N. Y. Supp. 869.

Judicial power, such as to punish for contempt, cannot be delegated to a commission.—*Langenberg v. Decker*, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108.

To try a question of contempt and to adjudge punishment is an exercise of judicial power. There is no such thing as a punishable contempt of executive authority. While an executive officer might be constituted a court, judicial power cannot be conferred on him as merely ancillary to the exercise of purely executive power. Not every one who hears testimony and exercises discretion and judgment in a matter submitted to him is necessarily a judicial officer.—(Opinion of Johnston, J., who did not concur in result.)—*In re Huron*, 58 Kan. 152, 48 Pac. 574, 36 L. R. A. 822n.

A notary public may be authorized to punish for contempt.—*Dogge v. State*, 21 Neb. 272, 31 N. W. 929.

To punish by a commitment for contempt is a power belonging only to judges of certain courts, and does not arise from the mere exercise of judicial functions.—*Matter of Kerrigan*, 33 N. J. L. 344.

It is not within the power of a commissioner of a federal court to punish for contempt.—*Ex parte Doll*, 7 Phila. (Pa.) 595.

[9] When a witness is in contempt.

Whether an officer of a corporation can personally be punished for contempt for failure to produce books and papers,—see ante, note [6].

In a proceeding in the Circuit Court upon a petition of the Interstate Commerce Commission under Interst. Com. Act, § 12, it is open to the defendant to contend that he was protected by the U. S. Constitution from making answer to the questions propounded, or that he was not bound to produce the books, papers, etc.; that neither the questions propounded nor the papers asked for related to the particular matter under investigation, nor to any matter which the Commission was entitled under the Constitution or laws to investigate. The issue is not one for the determination of a jury, nor is there any contempt until the issue of law is determined adversely to the defendant, and he has refused to obey, not the order of the Commission, but the final order of the court.—*Interst. Com. Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. R. 1125, revg. s. c. sub. nom. *In re Interst. Com. Commission*, 53 Fed. 476.

Notwithstanding the vesting of judicial powers in the courts, certain powers, in their nature judicial, belong to the legislature and may be delegated by it to a committee authorized to take testimony and summon witnesses, and a refusal to appear and testify before such committee, or to produce books, is a contempt.—*People v. Sharp*, 107 N. Y. 427, 14 N. E. 319.

[10] Due process required in punishing for contempt.

It is not necessary to due process of law that proceedings in a state court shall be by a particular mode, but only that there shall be a regular course of proceeding in which notice is given, of the claim asserted and an opportunity offered to defend against it.—*New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 22 Sup. Ct. R. (U. S.) 691.

The essential elements of due process are notice and an opportunity to defend.—*Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. R. (U. S.) 836.

New York Code of Civil Procedure, § 856, authorizing any judge, on proof by affidavit that a person subpoenaed and attending refuses without reasonable cause to answer on such examination legal and pertinent questions, to by warrant commit the offender to jail, is unconstitutional, since it does not require due notice to the witness nor an opportunity for him to be heard, nor does the fact that due notice and hearing are accorded validate a particular proceeding under the statute. The essential validity of the law is to be tested, not by what has been done under it, but by what might by its authority be done.—*Matter of Grout*, 105 App. Div. (N. Y.) 98, 93 N. Y. Supp. 711.

Quaere, is a court of first instance at liberty to punish for a contempt of its order, however gross, if that order is appealed from?—*New York Mail & N. Trans. Co. v. Shea*, 23 Misc. (N. Y.) 15, 49 N. Y. Supp. 951.

[11] Review of contempt orders.

An order made in a proceeding to punish for a criminal contempt in refusing to testify is reviewable by *certiorari*.—*People ex rel. Taylor v. Forbes*, 143 N. Y. 219; *People ex rel. Munsell v. Court of Oyer and Terminer*, 101 N. Y. 245, 4 N. E. 259; *People ex rel. Negus v. Dwyer*, 90 N. Y. 402; *People ex rel. Choate v. Barrett*, 56 Hun (N. Y.), 351, 9 N. Y. Supp. 321, affg. 121 N. Y. 678, 24 N. E. 1095.

[12] Regularity required in proceedings.

The taking of testimony under oath by commissioners of accounts is not a judicial proceeding, even where a witness may be adjudged guilty of contempt for refusing to testify.—*Matter of Hertle (In re Ahearn)*, 120 App. Div. (N. Y.) 717, 105 N. Y. Supp. 1022; affd. 190 N. Y. 29, 83 N. E. 1126.

Proceedings by a state railroad commission, which may punish with penalties disobedience to its orders, call for strictness and regularity, as the order has the force and effect of a criminal statute.—*Littlefield v. Fitchburg R. Co.*, 158 Mass. 1, 32 N. E. 859.

§ 20. Practice before the commissions; immunity of witnesses.—All hearings before a commission or a commissioner, shall be governed by rules to be adopted and prescribed by

the commission. And in all investigations, inquiries or hearings the commission, or a commissioner, shall not be bound by the technical rules of evidence. No person shall be excused from testifying or from producing any books or papers in any investigation or inquiry by or upon any hearing before a commission or any commissioner, when ordered to do so by the commission, upon the ground that the testimony or evidence, books or documents required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall under oath have testified or produced documentary evidence; provided, however, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained is intended to give, or shall be construed as in any manner giving unto any corporation immunity of any kind.

Procedure before Interstate Commerce Commission,—see Interst. Com. Act, §§ 9, 12, 13, 17, post, Appendix B.

Procedure before former Board of Railroad Commissioners,—see N. Y. R. R. L., §§ 157, 159, 163.

Procedure before former Board of Rapid Transit Railroad Commissioners,—see N. Y. Rap. Tr. Act, § 3, post, Appendix A.

Procedure in investigations by Commission,—see also, §§ 48, 72.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

[1] The Commission not bound by technical rules of procedure.

Where hearings will be held,—see ante, § 19, note [1].

Practice and procedure on investigations,—see also, post, § 48, notes.

The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof.—*Interst. Com. Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. R. (U. S.) 563.

The function of the Interstate Commerce Commission being in part quasi-judicial, it must have been the intention of Congress that the procedure before the Commission should substantially conform to that before a court charged with the duty of finding the facts and giving

judgment thereon, or to the investigation and report of a referee or special master in chancery, passing on both facts and law.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

In matters of rates, etc., one case can seldom be an exact precedent for another. Each traffic situation presents points of difference, and each complaint must be considered and decided on its own peculiar facts.—*Danville v. So. R. Co.*, 8 Inters. Com. R. 409.

The questions coming before the Interstate Commerce Commission are not of a character that the decision in one case is necessarily controlling in all similar cases. Its decisions can hardly be said to have the effect of an estoppel, nor is there the same reason for applying the maxim *stare decisis* which exists in courts of law. Conditions continually vary at different times and in different localities. But when the relation in freight rates (e. g., the differential) determines where and how business shall be done, the decisions of the Commission fixing or approving a given relation should only be reversed for imperative reasons. In the absence of some showing that new conditions have intervened, or that the effects of the original holding have been other than were anticipated, a prior decision should be controlling.—*Board of R. R. Comrs. v. A. T. & S. F. R. Co.*, 8 Inters. Com. R. 304.

The Interstate Commerce Commission will consider itself bound to follow a decision of the U. S. Circuit Court of Appeals upon the same facts, though between different parties,—*Cattle Raisers Assn. v. Fort Worth & D. C. R. Co.*, 7 Inters. Com. R. 513.

Giving due notice of the time and place of a hearing on a given subject and affording an opportunity to call or cross-examine witnesses is sufficient compliance with the Interstate Commerce Act.—*In re Excessive Rates on Food Products*, 3 Inters. Com. R. 151, 4 I. C. C. R. 116.

The object of the Interstate Commerce Commission, in its rules, is to simplify the practice as much as possible and exclude technicalities from its administration.—*Oregon S. L. R. Co. v. No. Pac. R. Co.*, 2 Inters. Com. R. 572, 639, 3 I. C. C. R. 264.

In formulating its rules as to the preparation of applications for the compulsory production of books, papers, etc., the Interstate Commerce Commission will consider the provisions of the Act by which it is created and governed, and also the rules and practice in analagous proceedings in federal courts.—*Rice v. Cincinnati, W. & B. R. Co.*, 2 Inters. Com. R. 507, 584, 3 I. C. C. R. 186.

The doctrine of estoppel of record does not apply to proceedings before the Interstate Commerce Commission. That body is not a court, but a special tribunal whose duties though largely administrative are sometimes semi or quasi judicial. It is required to investi-

gate and report. The law creating the Commission does not mention its final act as a judgment. It renders no judgment, enters no decree. The rule of estoppel of record, at all times technical in character, cannot be invoked against a complainant.—*Toledo Prod. Exch. & E. Kemble v. L. S. & M. S. R. Co.*, 2 Inters. Com. R. 492, 569, 3 Inters. Com. R. 830, 5 I. C. C. R. 166.

A case will not be decided on a theory not presented in the complaint or on the taking of testimony.—*Martin v. C. B. & Q. R. Co.*, 2 Inters. Com. R. 32, 2 I. C. C. R. 25.

Persons interested in a matter pending before the Interstate Commerce Commission will be permitted to appear and be heard therein, without their being made formal parties to the adjudication.—*Hurlburt v. L. S. & M. S. R. Co.*, 2 Inters. Com. R. 15, 31, 81, 448, 2 I. C. C. R. 122.

The Interstate Commerce Act deals with the substance of things and contemplates methods of procedure that are speedy and come to the very right of questions.—*Riddle Co. v. Pittsburg & L. E. R. Co.*, 1 Inters. Com. R. 773, 1 I. C. C. R. 490.

In deciding whether to permit amendments to complaints, the Interstate Commerce Commission will be governed by principles of judicial procedure.—*Riddle v. B. & O. R. Co.*, 1 Inters. Com. R. 701, 1 I. C. C. R. 372.

Where the question presented to a railroad commission is what is just and right between two railways who must bear the expense of a crossing, if there is a contract existing between the companies by which one of them is under obligation to bear all the expenses, the commission may not properly ignore the contract, for it is bound by the same rules of law that would govern a court in deciding the same question.—*Grand Trunk W. R. Co. v. Hunt*, — Ind. —, 81 N. E. 524.

[2] Immunity of witnesses — In General.

Immunity of witnesses in court proceedings to compel adherence to published interstate tariffs,—see Elkins Act, § 3, post, Appendix B.
Constitutional provisions as to privilege of witnesses,—see U. S. Const., Art. V., N. Y. Const., Art. I., § 6.

Immunity of witnesses in proceedings under Interstate Commerce Act extends only to natural persons,—see U. S. Act, June 30, 1906, c. 3920, U. S. Comp. Stat., Supp. 1907, p. 911.

Provisions of N. Y. Penal Code as to privilege of witnesses,—see N. Y. Penal Code, §§ 142, 469.

Punishment of witnesses for contempt,—see ante, § 19, notes [7]–[12].

When a proper case arises, the constitutional and statutory provisions should be applied in a broad and liberal spirit to secure to the citizen that immunity from every species of self-accusation implied in the brief but comprehensive language in which they are expressed.—*People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303.

It is perfectly well settled that where there is no legal provision to protect the witness against the reading of the testimony on his own trial, he cannot be compelled to answer.—*People v. Mather*, 4 Wend. (N. Y.) 229.

[3] — What statutory provisions are sufficiently broad.

Interst. Com. Act, § 12, as amd. Feb. 11, 1893, affords absolute immunity against prosecution in state or federal courts, for the transactions and matters to which the question relates, and a witness will not be upheld in refusing to testify.—*Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. R. (U. S.) 644, affg. s. c. 70 Fed. 46.

U. S. Rev. Stat., § 860, was not broad enough to secure immunity, because it did not provide for immunity from prosecution, for a witness asked to give testimony which might incriminate him. It could not and would not prevent the use of his testimony to ferret out other testimony to be used in evidence against him.—*Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. R. (U. S.) 195.

N. Y. Const., Art. I, § 6, provides that no person "shall be compelled in any criminal case to be a witness against himself." N. Y. Penal Code, § 342, provides that "No person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter upon the ground that such testimony would tend to convict him of a crime; but such testimony cannot be used against him upon any criminal investigation or proceeding."—*Held*, that the Code provision is not as broad as the constitutional guaranty, and hence does not remove the right of a witness to decline to give incriminating testimony. It does not prevent the use of evidence which may be procured through information elicited from him, but merely excludes such testimony.—*People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 68 N. E. 353, affg. s. c. 81 App. Div. (N. Y.) 51, 80 N. Y. Supp. 816.

L. 1899, ch. 690, known as the Anti-Monopoly Act, does not infringe on the personal privilege of witnesses and their constitutional protection against being compelled to give self-incriminating testimony, although such Act may compel the giving of testimony in preliminary inquiries by the attorney-general to secure testimony to assist him in drawing his complaint or preparing for trial.—*Matter of Davies*, 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855, revg. s. c. 55 App. Div. (N. Y.) 245, 67 N. Y. Supp. 492.

The mere immunity to a witness of not having his testimony used against him in a criminal prosecution is not sufficient to deprive him of his constitutional privilege of refusing to incriminate himself, but nothing short of full immunity against future prosecution for any criminal offense which his testimony tended to disclose, will suffice.—*People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303.

N. Y. Const., Art. I, § 6, provided that no person should “be compelled, in any criminal case, to be a witness against himself.” N. Y. Penal Code, § 79, provided that any person violating the sections thereof as to bribery “is a competent witness against another person so offending, and may be compelled to testify upon any trial, hearing, proceeding or investigation;” also that “the testimony so given shall not be used in any prosecution or proceeding * * * against the person so testifying” but that “the person testifying to the giving of a bribe which has been accepted shall not thereafter be liable to indictment, prosecution or punishment for that bribery.”—*Held*, that the immunity conferred was sufficiently broad, so that the compelling of testimony under the section does not infringe any constitutional guaranties.—*People v. Sharp*, 107 N. Y. 427, 14 N. E. 319.

A provision that “the testimony so given shall not be used in any prosecuting or proceeding, civil or criminal, against the person so testifying,” is broad enough to meet the requirements of New York Const., Art. I, § 6. The latter does not protect him against the possibility that his testimony, though it may not be used to convict him, may make easy the discovery of other admissible testimony which will have that effect. The witness’ protection is only against being compelled to directly give testimony against himself at his own trial.—*People ex rel. Hackley v. Kelley*, 24 N. Y. 74. Apparently overruled in *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303, to conform to the doctrine of *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. R. (U. S.) 195. But see *People ex rel. Lewisohn v. O’Brien*, 176 N. Y. 253, 68 N. E. 353, which says that the Court of Appeals has not gone so far as to overrule *People ex rel. Hackley v. Kelley*, but has only adopted “a less technical and more liberal interpretation of this brief provision of the Constitution.”

A provision of the usury statute that the answer of a defendant in a case thereunder shall not be used against him before any grand jury, or on the trial of any indictment against him, is broad enough to secure the witness the constitutional immunity.—*Perrine v. Striker*, 7 Paige (N. Y.), 598.

The statute authorizing a Supreme Court Justice to examine certain New York city officials, provided that the answers of a witness “shall not be used against him in any criminal proceeding.”—*Held*, that in spite of the decision of the United State Supreme Court in

Counselman v. Hitchcock (142 U. S. 547, 12 Sup. Ct. R. (U. S.) 195), and the New York Court of Appeals in *People ex rel. Taylor v. Forbes* (143 N. Y. 219, 38 N. E. 303), the provision is valid as affording sufficient protection. Witnesses examined under it cannot be compelled to be witnesses against themselves in respect of a criminal offense. If any part of it had to be construed to the contrary, that part only would be void. The part which empowers the judge to punish witnesses for contempt for refusal to answer does not apply to questions which a witness may refuse to answer under his said constitutional privilege, but only to questions which he may be lawfully required to answer. This interpretation of the statute makes it constitutional.—*Matter of Leich*, 31 Misc. (N. Y.) 671, 65 N. Y. Supp. 3.

L. 1897, ch. 383, § 7, known as the Anti-Monopoly Act, provided that "no person shall be excused from answering any questions that may be put to him upon the examination, on the ground that it may tend to convict him of a violation of the provisions of the act;" also that "the testimony given by a witness in a proceeding or examination under this act shall not be given in evidence against him in any criminal action or proceeding, nor shall any criminal action or proceeding be brought against such witness on account of the testimony so given by him."—*Held*, that these provisions are not broad enough to secure the constitutional immunity to the witness. While they would protect him from an indictment for perjury because of any falsity of his testimony, they would afford him no immunity from prosecution for the crime which is revealed by the information which he is compelled to disclose.—*Matter of Attorney-General*, 21 Misc. (N. Y.) 101, 47 N. Y. Supp. 20; *affd.* 22 App. Div. (N. Y.) 285, 47 N. Y. Supp. 883.

[4] — A personal privilege.

The protection afforded by the Fifth Amendment to the U. S. Constitution is a personal privilege extended only to the witness. He cannot set it up in behalf of any other person, or any corporation of which he is an officer or employee. As between the witness and the corporation, the latter is a third person, within the meaning of the immunity section.—*Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. R. (U. S.) 370.

[5] — When it may be asserted.

Where the scope of an investigation is broad enough to enable the examination of a witness in particulars which could not tend to in-

incriminate him, he has to be sworn, and is left to assert his privilege if it should be infringed on during this examination. He cannot claim the privilege in advance.—*Matter of Leich*, 31 Misc. (N. Y.) 671, 65 N. Y. Supp. 3; *Skinner v. Steele*, 88 Hun (N. Y.), 307, 34 N. Y. Supp. 748.

The constitutional claim of privilege may be raised by the witness upon a motion made in his behalf to vacate the *ex parte* order under which it is sought to compel his testimony. The witness need not wait until the examination is in progress and a question has been asked tending to incriminate him.—*Matter of Attorney-General*, 21 Misc. (N. Y.) 101, 47 N. Y. Supp. 20; *affd.* 22 App. Div. (N. Y.) 285, 47 N. Y. Supp. 883.

[6] — Waiver or destruction of privilege.

In an investigation into a transaction, a witness does not waive or lose his right to decline to testify as to it, by testifying that he had no connection whatever with the transaction.—*People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303.

That the witness has previously given testimony denoting his innocence in the transactions under investigation does not destroy his right to claim the privilege of refusing to answer on the ground that his testimony might incriminate him.—*People v. Lewis*, 14 Misc. (N. Y.) 264, 35 N. Y. Supp. 664.

A witness attending an investigation pursuant to a subpoena and testifying there under oath, cannot be considered a willing or consenting witness, and failure to assert his privilege does not amount to a waiver of it.—*People v. Sharp*, 107 N. Y. 427, 14 N. E. 319.

[7] — To what proceedings applicable.

No law can be valid which directly or indirectly compels a party to accuse or incriminate himself, or to testify by affidavit or otherwise respecting his guilt or innocence. The constitutional immunity from every species of incrimination may be as effectually violated by a law which compels a person to plead or deny upon oath any charge involving a criminal offense, without regard to the form of the investigation, as by a law compelling him to testify as a witness.—*In re Peck*, 167 N. Y. 391, 60 N. E. 775, 53 L. R. A. 888; *Gadsen v. Woodward*, 103 N. Y. 242, 8 N. E. 653; *People v. Courtney*, 94 N. Y. 490; *Thomas v. Harrop*. 7 How. Pr. (N. Y.) 57; *Hill v. Muller*, 2 Sandf. (N. Y.) 684.

[8] — Production of books and papers.

Compelling production of books and papers,—see ante, § 19, notes [3]–[6].

When a corporation, after a notice to produce books and papers, objects to such production on the ground that they might tend to incriminate the company, the company should produce the books for the inspection of the court in order that the court may be able to determine as to the sufficiency of the excuse given.—*Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. R. (U. S.) 178, affg. s. c. — Vt. —, 66 Atl. 790.

A witness who cannot avail himself of the Fifth Amendment to the U. S. Constitution as to his oral testimony, because of an immunity statute, cannot set it up against the production of books and papers, as the same statute would equally grant him immunity as to matters proved by the same. Production of books and papers under a subpoena *duces tecum* does not violate the search and seizure clause of the Fourth Amendment.—*Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. R. (U. S.) 370.

An officer of a corporation charged with criminal violation of a statute cannot plead the criminality of the corporation, in order to resist the production of its books and papers. The corporation is a creature of the state, which has a special right to examine its books and papers.—*Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. R. (U. S.) 370.

Compelling the production of contracts between railroads and coal companies which resulted in the abandonment of a proposed competing line by the latter, is not a violation of the Fourth and Fifth Amendments of the U. S. Constitution.—*Interstate Com. Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. R. (U. S.) 563.

In an action against a railroad corporation by a shipper for violating the Interstate Commerce Act, it cannot refuse to produce its books, papers, etc., on the ground that the contents thereof would incriminate it.—*International Coal M. Co. v. Pa. R. Co.*, 152 Fed. 557.

On the trial of an indictment under N. Y. Penal Code, § 344a, relative to policy playing, private papers and property of the defendant, claimed to have been unlawfully seized by police officers, were received in evidence for the direct purpose of proving the handwriting of the defendant on certain policy slips, and his occupation of the premises in which they were found.—*Held*, that this did not constitute compelling him to become a witness against himself, within the meaning of N. Y. Const., Art. I, § 6.—*People v. Adams*, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, affg. s. c. 85 App. Div. (N. Y.) 390, 83 N. Y. Supp. 481.

Plaintiffs, owners of elevators outside an association alleged to be an unlawful trust, were suing the association, of which Sowerby was president, and certain railroads, for an alleged unlawful conspiracy to restrain and injure trade and commerce, including the business of plaintiffs. An order had been made in the case, on the application of plaintiffs, that Sowerby produce certain contracts between his association and the defendant railroads. This he declined to do, asking that the order be vacated, on the ground that such contracts, if produced, would tend to show a conspiracy which, as plaintiffs conceded, was criminal, and that proof of such a conspiracy would implicate him in the commission of the offense. Plaintiffs claimed that the immunity privilege could not be claimed in a civil suit of this character, but only in criminal prosecutions.—*Held*, that the order should be vacated. The constitutional guaranty is equally applicable to civil and criminal proceedings, and whether the person is sought to be examined as a witness or is required to produce as evidence books and papers in his possession.—*Kellogg v. Sowerby*, 32 Misc. (N. Y.) 327, 66 N. Y. Supp. 542.

In a civil suit for damages, defendant was commanded by a subpoena *duces tecum*, to produce the books of his business. He refused on the ground that they would tend to convict him of a criminal offense.—*Held*, that the same rule of law which excuses a witness from answering questions which may tend to convict him of a crime or misdemeanor undoubtedly excuses him also from producing books or papers, the contents of which may be used against him and tend to the same result.—*Byass v. Sullivan*, 21 How. Pr. (N. Y.) 50.

An agent of a carrier may constitutionally be compelled to produce its tariff sheets and testify from them against the company.—*Louisville & N. R. Co. v. Commonwealth*, 21 Ky. L. R. 239, 51 S. W. 167.

[9] — When witness will be compelled to answer.

A witness cannot refuse to testify before a federal tribunal on the ground that the immunity granted by the federal statute does not extend to prosecutions in a state court.—*Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. R. (U. S.) 370.

In a proceeding under the Kansas Anti-trust Act, a witness can be asked only such questions as relate to the violation of the statute regarding transactions within the state and cannot be questioned as to matters of interstate commerce, which might constitute a violation of the Federal Anti-trust Act. Therefore, although information may be incidentally given which might possibly be used in a prosecution under the federal Act, such danger is remote and the provision of the state Act compelling witnesses to give incriminating testimony but giving immunity against state prosecution is not in violation of the Fourteenth Amendment to the

U. S. Constitution in that it does not give immunity against federal prosecution.—*Jack v. Kansas*, 199 U. S. 372, 26 Sup. Ct. R. (U. S.) 73.

Where a witness claims that an answer to a question will tend to incriminate him, it is not for the witness, but for the judge, to decide whether, under all the circumstances, such might be the effect and the witness entitled to the privilege of silence.—*Foot v. Buchanan*, 113 Fed. 156.

Where the witness declines to answer on the ground that his answers might tend to incriminate him, he is the sole judge whether he can safely answer, unless the court can perceive that his refusal is merely a fraudulent device to protect a third party, and that no possible danger can result to the witness from his answering the questions.—*People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 68 N. E. 353, affg. s. c. 81 App. Div. (N. Y.) 51, 80 N. Y. Supp. 816.

The witness, who knows what the court does not know, and what he cannot disclose without accusing himself, must judge for himself as to the effect of his answer, and if, to his mind, it may constitute a link in a chain of testimony, sufficient to convict him when other facts are shown, or to put him in jeopardy, or subject him to the hazard of a criminal charge, he may remain silent. The witness may be compelled to answer when he contumaciously refuses, or when it is perfectly clear and plain that he is mistaken, and that the answer cannot possibly injure him, or tend in any degree to subject him to the peril of prosecution. But the courts have recognized the impossibility in most cases of anticipating the effect of the answer.—*People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303.

Where it is not so perfectly clear and manifest that the answer called for cannot incriminate, as to preclude all reasonable doubt or fair argument, the privilege must be recognized and protected.—*Janvrin v. Scammon*, 29 N. H. 280.

§ 21. Court proceedings; preferences.—All actions and proceedings under this act, and all actions and proceedings commenced or prosecuted by order of either commission, and all actions and proceedings to which either commission or the people of the state of New York may be parties, and in which any question arises under this act or under the railroad law, or under or concerning any order or action of the commission, shall be preferred over all other civil causes except election causes in all courts of the state of New York and shall be heard and determined in preference to all other civil business pending therein excepting election causes, irrespective

of position on the calendar. The same preference shall be granted upon application of counsel to the commission in any action or proceeding in which he may be allowed to intervene.

All actions to which the Interstate Commerce Commission is a party are preferred causes,—see Interst. Com. Act, § 16, post, Appendix B.

Power of Interstate Commerce Commission to bring suit in its own name for the enforcement of orders,—see Interst. Com. Act, § 16 post, Appendix B.

Provisions of New York Code of Civil Procedure relative to preferred causes,—see N. Y. Code Civ. Pro., §§ 789-793.

For similar provisions as to actions or proceedings by or against the former Board of Rapid Transit Railroad Commissioners,—see N. Y. Rap. Tr. Act, § 9, post, Appendix A.

Summary proceedings to enforce orders of Commission,—see post, §§ 57, 74.

A statute which denies to the court discretion in determining whether a case shall be preferred is unconstitutional.—*Riglander v. Star Company*, 98 App. Div. (N. Y.) 101, 90 N. Y. Supp. 772, *affd.* 181 N. Y. 531, 73 N. E. 131; *Martin's Bank v. Amazonas Co.*, 98 App. Div. (N. Y.) 146, 90 N. Y. Supp. 734.

The court has power by special order to place an action brought by The City of New York upon the preferred calendar for a particular day even though the notice for a preference was insufficient.—*City of New York v. Shack*, 81 App. Div. (N. Y.) 575, 81 N. Y. Supp. 392.

In cases specified by N. Y. Code of Civil Procedure, § 791, subd. 1, 2, the attorney for either the state or the municipal corporation is entitled to have the case tried upon the day for which notice is given without regard to its position upon the calendar.—*Sheerin v. City of New York*, 74 App. Div. (N. Y.) 308, 77 N. Y. Supp. 511.

§ 22. Rehearing before commission;* [effect of application for a rehearing].—After an order has been made by a commission any party interested therein may apply for a rehearing in respect to any matter determined therein, and the commission may grant and hold such a rehearing if in its judgment sufficient reason therefor be made to appear; if a rehearing shall be granted, the same shall be determined by the commission within thirty days after the same shall be finally submitted. An application for such a rehearing shall not excuse any common carrier, railroad corporation or street railroad corporation from complying with

or obeying any order or any requirement of any order of the commission, or operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct. If, after such rehearing and a consideration of the facts, including those arising since the making of the order, the commission shall be of opinion that the original order or any part thereof is in any respect unjust or unwarranted, the commission may abrogate, change or modify the same. An order made after any such rehearing abrogating, changing or modifying the original order shall have the same force and effect as an original order but shall not affect any right or the enforcement of any right arising from or by virtue of the original order.

Rehearing before Interstate Commerce Commission,—see Interst. Com. Act, § 16a, post, Appendix B.

[1] When a rehearing will be granted.

A section of the Interst. Com. Act, § 15, was amended, with no provision continuing the old section in force as to cases decided but still pending before the Interstate Commerce Commission.—*Held*, that the Commission should re-open such a case, permitting further testimony, and make an order under the new section.—*Cattle Raisers' Assn. v. Mo. K. & T. R. Co.*, 12 Interst. Com. R. 5.

In a proper case, the Interstate Commerce Commission will dismiss a complaint without prejudice and with a proviso that the complainant may have a re-hearing upon asking for it.—*Willson v. Rock Creek R. Co.*, 7 Interst. Com. R. 83.

The Interstate Commerce Commission is not precluded from rehearing a particular case and amending or modifying its original order therein, by the refusal of a Circuit Court of the United States to enforce such order against the carriers affected thereby, especially when the reasons assigned for such refusal do not relate to the principal question in controversy and are consistent with an approval of the amended or modified order.—*Page v. D. L. & W. R. Co.*, 6 Interst. Com. R. 548.

To justify reopening and rehearing a case that has been decided, the petition must show *prima facie* the overlooking or misapprehension of material testimony, or obvious error of fact or law.—*Myers v. Pa. Co.*, 2 Interst. Com. R. 544, 3 I. C. C. R. 130.

* Words in brackets are not a part of section heading as enacted.—Ed.

The N. Y. Public Service Commission has the power to change a determination either of itself or of the former Board of Railroad Commissioners as to the method, specifications, etc., for the construction of a grade crossing.—*Petition of Terminal Ry. of Buffalo*. Decided by the N. Y. Public Service Commission for the Second District, May 4, 1908.

[2] When a rehearing will be denied.

The Interstate Commerce Commission made a final order in a proceeding, but nine months afterwards neither the complainants nor the Commission having instituted any suit to enforce the order, and the defendants not having complied therewith, the complainants ask to have the case reopened, the original order stricken from the records, and a new order made under the new phraseology of the section under which the original order was made, that section having been in the meantime amended. No error of law or facts in the making of the original order is alleged.—*Held*, that a rehearing should be denied.—*Cattle Raisers' Assn. v. C. B. & Q. R. Co.*, 12 Inters. Com. R. 1.

Where the discrepancies alleged to exist between the facts originally found and those now proposed to be shown, do not sustain any controlling relation to the decision previously reached, they do not warrant reopening the case.—*Railroad Com. of Florida v. Savannah, F. & W. R. Co.*, 3 Inters. Com. R. 750, 5 I. C. C. R. 138.

A petition for a rehearing cannot be granted on a mere allegation of error in the findings of fact. The supporting affidavits must make at least a *prima facie* showing of such error.—*Proctor v. C. H. & D. R. Co.*, 3 Inters. Com. R. 374, 4 I. C. C. R. 443.

An application for a rehearing, which offers no new testimony that can change the result, but only asks a reconsideration of the same facts and questions of law, will be denied.—*Myers v. Pa. Co.*, 2 Inters. Com. R. 544, 3 I. C. C. R. 130.

Where a complaint has been determined upon pleadings and proofs, and no party thereto has applied for a rehearing, an application for a rehearing, made by others not parties, will not be granted.—*In re Petition of Prod. Exch. of Toledo*, 2 Inters. Com. R. 412, 2 I. C. C. R. 588.

The Interstate Commerce Commission will cheerfully and carefully examine and consider all applications for rehearings by a party to any proceeding before it who will point out errors he may think have been committed, either of law or fact, with view to their prompt correction; yet it will not in any proceeding direct a rehearing involving the expense to the parties of appearing before it for a reargument, unless satisfied that such reargument might have the effect of changing the de-

cision already made.—*Riddle Co. v. Pittsburg & L. E. R. Co.*, 1 Inters. Com. R. 773, 1 I. C. C. R. 490.

In the absence of statutory authorization, the New York Board of Railroad Commissioners cannot subsequently reconsider or review its action in granting permission to a street railroad to change its motive power. Such permission is in the nature of a franchise.—*People ex rel Luckings v. Board of R. R. Comrs.*, 30 App Div. (N. Y.) 69, 51 N. Y. Supp. 781, affg. 156 N. Y. 693, 51 N. E. 1093.

It seems that the N. Y. Public Service Commission for the Second District has no power to review a final determination of the former Board of Railroad Commissioners.—*Petition of the Town Board of Cornwall.* Decided by the N. Y. Public Service Commission of the Second District, Feb. 18, 1908.

Whether an order made by the former Board of Railroad Commissioners was within the powers of such Board is purely a question of law which the Public Service Commission has no power to determine.—*Petition of the Town Board of Cornwall.* Decided by the N. Y. Public Service Commission of the Second District, Feb. 18, 1908.

[3] When a prior decision will be modified or reversed.

In a case where the relation in freight rates determines where and how business shall be done, the decisions of the Interstate Commerce Commission fixing or approving a given relation should be reversed only for imperative reasons.—*Board of R. R. Comrs. v. A. T. & S. F. R. Co.*, 8 Inters. Com. R. 304.

The Interstate Commerce Commission will reverse its decision upon a rehearing, if the new and additional evidence calls for such a reversal.—*Bates v. Pa. R. Co.*, 3 Inters. Com. R. 296, 4 I. C. C. R. 281, revg. s. c. 2 Inters. Com. R. 608, 732, 734, 715, 3 I. C. C. R. 435.

[4] Right to rehearing.

The provision of the New York Gas and El. Com. Act that the rates fixed by the Commission shall be the maximum prices for three years and until upon complaint the Commission shall fix a new price, is invalid. To give the corporation no opportunity or right to apply for a rehearing or a new adjustment of rates violates the fourteenth amendment to the U. S. Constitution.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123, 83 N. E. 693, revg. s. c. 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 341.

§ 23. Service and effect of orders;* [grounds for their suspension or abrogation].— Every order of a commission shall be served upon every person or corporation to be affected thereby, either by personal delivery of a certified copy thereof, or by mailing a certified copy thereof, in a sealed package with postage prepaid, to the person to be affected thereby or, in the case of a corporation, to any officer or agent thereof upon whom a summons may be served in accordance with the provisions of the code of civil procedure. It shall be the duty of every person and corporation to notify the commission forthwith, in writing, of the receipt of the certified copy of every order so served, and in the case of a corporation such notification must be signed and acknowledged by a person or officer duly authorized by the corporation to admit such service. Within a time specified in the order of the commission every person and corporation upon whom it is served must if so required in the order notify the commission in like manner whether the terms of the order are accepted and will be obeyed.

Every order of a commission shall take effect at a time therein specified and shall continue in force for a period therein designated unless earlier modified or abrogated by the commission or unless such order be unauthorized by this or any other act or be in violation of a provision of the constitution of the state or of the United States.

Provisions as to service and effect of reports and orders of the Interstate Commerce Commission,—see Interst. Com. Act, §§ 14-16, post, Appendix B.

Parallel provisions with reference to the former Board of Railroad Commissioners,—see N. Y. R. R. L., §§ 160-162.

Application for rehearing shall not operate to stay or postpone enforcement of an order of a Commission,—see ante, § 22.

Order of Commission as to switch and sidetrack connections,—see post, § 27, subd. 2.

Order of Commission prescribing changes in the form of schedules of rates, etc.,—see post, § 28.

Order of Commission allowing changes in rates on less than 30 days' notice thereof,—see post, § 29.

Order of Commission permitting a lesser charge for longer than shorter distances in special cases,—see post, § 36.

Order of Commission relieving a carrier from the necessity of having sufficient cars and motive power, etc,—see post, § 37.

* Words in brackets are not a part of section heading as enacted.—Ed.

Order of Commission regulating the distribution of freight cars to shippers, the switching, loading, unloading and weighing the same and demurrage charges thereon,—see post, § 37.

Investigations by Commission to determine whether carriers are complying with the provisions of this Act and orders of the Commission,—see ante, § 45, subd. 2.

Order of Commission prescribing the form of the annual reports of corporations subject to this Act,—see post, §§ 46, 66.

Procedure in an investigation in which an order is to be issued,—see post §§ 48, 72.

Service of orders of Commission,—see also post, § 49.

Order of Commission fixing rates and service,—see post, § 49.

Order of Commission establishing through routes and joint rates,—see post, § 49.

Order of Commission prescribing the division of joint rates,—see post, § 49.

Order of Commission for repairs or changes in tracks, terminals, motive power, etc.—see post, § 50.

Order of Commission for changes in time schedules, or the running of additional cars and trains,—see post, § 51.

Order of Commission establishing a uniform system of accounts to be used by corporations subject to this Act,—see post, §§ 52, 66, subd. 4.

Order of Commission granting a certificate of public convenience and necessity,—see post, § 53.

Order of Commission approving of transfers of franchises of stock of corporations subject to this Act,—see post, §§ 54, 70.

Order of Commission approving issuance of stocks, bonds, and other forms of indebtedness,—see post, §§ 55, 69.

Summary proceedings to enforce orders of Commission,—see post, §§ 57, 74.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Power of federal courts to review the construction put upon state statutes by state courts,—see ante, § 1, note [33].

Right of Commission to appear by counsel on an appeal from its decision,—see ante, § 12, note.

Rehearing before Commission,—see ante, § 22, notes [1]–[3].

Burden of proof on appeal from order requiring building of connecting switch,—see post, § 35, note [37].

Power of courts to revise order refusing relief from long and short haul rule,—see post, § 36, note [18].

Judicial enforcement of orders,—see post, § 57, notes.

[1] Effect of orders — Validity presumed.

It will be presumed that a state railroad commission, in fixing a rate, acted with a full knowledge of the situation, and its conclusions will not

be upset unless shown affirmatively to be erroneous.—*Seaboard Air L. R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, affg. s. c. 48 Fla. 129, 37 So. 314, 48 Fla. 150, 37 So. 658.

Rates fixed by a state commission are presumptively reasonable, and the burden is on the carrier to show the contrary.—*Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. R. (U. S.) 900, affg. s. c. 80 Minn. 191, 83 N. W. 60.

Where a railroad commission has fixed rates without full and complete inquiry into the facts, there is no presumption that the rates so fixed are in fact reasonable and just.—*Cumberland T. & T. Co. v. R. R. Comm.*, 156 Fed. 823.

Section 5 of the act creating the Texas Railroad Commission provided that rates fixed by it shall be held conclusive, until finally found otherwise. The constitutionality of the provision discussed but not decided.—*Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. R. (U. S.) 1047.

A provision giving a *prima facie* or conclusive force to rates fixed by a state commission, if unconstitutional, will not invalidate the power of the commission to fix rates, nor the rates fixed by the commission.—*Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 14 Sup. Ct. R. (U. S.) 1047.

To give a commission power to fix rates which shall be final and conclusive and deny the carrier the right to question in court the reasonableness of the rates, is unconstitutional.—*Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. R. (U. S.) 462, 702, revg. s. c. 38 Minn. 281, 37 N. W. 782.

While a rate fixed by a state railroad commission is subject to judicial review, there is no presumption to begin with that it is invalid, but the contrary.—*Central of Ga. R. Co. v. McLendon*, 155 Fed. 974.

Rates fixed by a state commission are *prima facie* reasonable.—*Seaboard Air L. R. Co. v. R. R. Commission*, 155 Fed. 792.

A bill seeking to restrain the enforcement of two statutes regulating rates and an order of the Minnesota Railroad and Warehouse Commission promulgated under the authority of a legislative act, is not multifarious, since the order has the same effect as a legislative act, and all the matters sought to be restrained amount to legislation that has been put forth by the state.—*Perkins v. No. Pac. R. Co.*, 155 Fed. 445.

Prima facie it is to be presumed that the rate fixed by the state to be charged for gas is a proper one, and the burden is on the complainant to show it is not.—*Consolidated Gas Co. v. Mayer*, 146 Fed. 150.

Rates fixed by a commission authorized so to do, are presumptively reasonable.—*Matthews v. Board of Corp. Comrs.*, 106 Fed. 7.

The word "fix," used as to rates of a gas company, means to make fast, firm and immovable, and makes the action of the tribunal conclusive, in the absence of fraud or gross misconduct amounting to bad faith.—*Logansport & W. V. Gas. Co. v. Peru*, 89 Fed. 185.

The presumption that a rate fixed by Congress is reasonable cannot be overcome except by a showing as to receipts and expenses over an adequate period.—*Atlantic & P. R. Co. v. U. S.*, 76 Fed. 186.

An act authorizing a state railroad commission to fix just and reasonable rates and making the order of the commission conclusive evidence of the reasonableness of such rates, would be unconstitutional; but an act making such order "sufficient" evidence will not be overthrown, in the absence of a holding by the state court that "sufficient" in the act means conclusive.—*Richmond & D. R. Co. v. Trammell*, 53 Fed. 196.

The presumption is, in proceedings before the Interstate Commerce Commission, that the rates fixed by a state railroad commission are reasonable, and the burden of proof is on the carriers to show the contrary.—*Bradham v. Atlantic C. L. R. Co.*, 11 Inters. Com. R. 464

The presumption is in favor of the reasonableness of an ordinance requiring a street railway to run cars at specified intervals, and the burden is on the company to show the contrary.—*Mayor v. Dry Dock, E. B. & B. R. Co.*, 133 N. Y. 104, 30 N. E. 563, revg. s. c. 15 N. Y. Supp. 297.

In the passage of regulations within the scope of its authority from the legislature, it will be presumed that the body entrusted with the making of regulations as to the running of street cars, etc., acted in the exercise of a judgment upon facts, and for reasons calling for such action.—*Mayor v. Dry Dock, E. B. & B. R. Co.*, 133 N. Y. 104, 30 N. E. 563, revg. s. c. 15 N. Y. Supp. 297.

The decisions of the N. Y. Board of Railroad Commissioners have no binding or conclusive authority, but are merely advisory and recommendatory.—*People v. Rome, W. & O. R. Co.*, 103 N. Y. 95, 8 N. E. 369.

An act of the legislature declaring any circumstance or evidence *prima facie* proof of a fact, is constitutional.—*Howard v. Moot*, 64 N. Y. 262.

On an appeal from an order of the N. Y. Gas and Electricity Commission, the presumption is in favor of the order appealed from.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 34; revd. on other grounds, 191 N. Y. 123, 83 N. E. 693.

The court will not reverse a finding of the N. Y. Board of Railroad Commissioners that public convenience and necessity require the construction of a railroad, unless it is made clearly and decisively to appear that such determination was based on erroneous legal principles or was contrary to the clear weight of evidence.—*People ex rel. Terminal R. Co. v. Board of R. R. Comrs.*, 53 App. Div. (N. Y.) 61, 65 N. Y. Supp. 597; affd. 164 N. Y. 572, 58 N. E. 1091.

The Appellate Division, when asked to reverse the action of the N. Y. Board of Railroad Commissioners in granting a certificate of convenience and necessity as against the weight of evidence, will apply the same rules as to a motion to set aside a verdict in an action in the Supreme Court.—*People ex rel. L. I. R. Co. v. Board of R. R. Comrs.*, 42 App. Div. (N. Y.) 366, 59 N. Y. Supp. 144.

The denial by the N. Y. Board of R. R. Commissioners of the petitioner's application for a certificate of necessity under N. Y. R. R. L., § 59, was the exercise of a power largely discretionary in its character which the legislature of this state had vested in a body created for a special purpose and composed of men peculiarly qualified by experience to deal with the vexatious problems arising out of the ever increasing demand for better and more adequate transportation. And while this court has been expressly empowered to review the action of the commissioners in refusing to grant such a certificate as was asked for in this case, yet it has held in every instance where a review has been had, that for the reason above stated their determination must be treated in the same manner as that of any other subordinate judicial tribunal whose judgments are subject to review, which is equivalent to saying that their conclusion must be respected and sustained unless it be made clearly and affirmatively to appear that it was founded upon erroneous legal principles, or that in reaching the same the Commissioners proceeded contrary to the clear weight of evidence, or that they abused the discretion vested in them and arbitrarily refused to issue the certificate asked for.—*Matter of Auburn & W. R. Co.*, 37 App. Div. (N. Y.) 162, 55 N. Y. Supp. 895; *Matter of Depew & S. W. R. Co.*, 92 Hun (N. Y.), 406, 36 N. Y. Supp. 991; *Matter of Amsterdam, J. & G. R. Co.*, 86 Hun (N. Y.), 578, 33 N. Y. Supp. 1009; *Matter of New Hamburg & P. C. R. Co.*, 76 Hun (N. Y.), 76, 27 N. Y. Supp. 664; *People v. Ulster & D. R. Co.*, 58 Hun (N. Y.), 266, 12 N. Y. Supp. 303; *affd.* 128 N. Y. 240, 28 N. E. 635.

A rate fixed by legislative authority is presumptively reasonable.—*Beardsley v. N. Y. L. E. & W. R. Co.*, 15 App. Div. (N. Y.) 251, 44 N. Y. Supp. 175, *affg.* s. c. 17 Misc. (N. Y.) 256, 40 N. Y. Supp. 1077; *revd.* on other grounds, 162 N. Y. 230, 56 N. E. 488.

In contesting a decision of the N. Y. Board of Railroad Commissioners before the Appellate Division, the burden is on the petitioner to show affirmatively that the Board erred in its determination, and the Board is to be credited with some technical knowledge the court is not presumed to possess.—*Matter of Kings, Q. & S. R. Co.*, 6 App. Div. (N. Y.) 241, 39 N. Y. Supp. 1004.

The burden is on the contesting party to show that the decision of the Board of Railroad Commissioners, in granting a certificate of necessity to one of two rival applicants, was against the clear weight of evidence.—*People ex rel. Depew & S. W. R. Co. v. Board of R. R. Comrs.*, 4 App. Div. (N. Y.) 259, 38 N. Y. Supp. 528.

Regulations made by state railroad commissioners to prevent unjust discrimination, are *prima facie* reasonable.—*State ex rel. Ellis v. Atlantic C. L. R. Co.*, — Fla. —, 41 So. 705.

Rates fixed by a state commission are not conclusive as against judicial inquiry, but are competent and adequate evidence in the absence of countervailing proof.—*Pensacola & A. R. Co. v. Florida*, 25 Fla. 310, 5 So. 833, 3 L. R. A. 661n.

The burden of proving that rates fixed by a commission are unreasonable is on the carrier.—*Southern R. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429.

A rate fixed by a city pursuant to statutory authority will be presumed to be reasonable until its unreasonableness is shown, and the burden of showing the rate to be unreasonable rests upon the carrier.—*Chicago U. Traction Co. v. City of Chicago*, 199 Ill. 579, 65 N. E. 470.

A statute which creates a commission with power to make a schedule of maximum rates which shall not be conclusive as to the reasonableness of the charges, but only *prima facie* evidence of their reasonableness, is valid, as judicial inquiry is not thereby cut off.—*Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141.

Every presumption is in favor of the action of a commission, and the burden is on the carrier to show each action was contrary to law.—*Steenerson v. Gt. Northern R. Co.*, 69 Minn. 353, 72 N. W. 713.

Under the Minnesota statute giving a commission power to fix rates, the rates so fixed are not merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges.—*State v. Ch. M. & St. P. R. Co.*, 38 Minn. 281, 37 N. W. 782; *revd.* 134 U. S. 418, 10 Sup. Ct. R. (U. S.) 462, 702.

Rates fixed by a state commission are *prima facie* but not conclusively correct.—*Stone v. N. J. & C. R. Co.*, 62 Miss. 646.

A city ordinance required that between certain hours a sufficient number of street cars should be run to provide a seat for every passenger from whom a fare was demanded.—*Held*, that in the absence of proof that the ordinance is under all circumstances unreasonable and oppressive, it should be permitted to stand, to be enforced except in cases where it may be made affirmatively to appear that the operation of its provisions is unreasonable or oppressive.—*North Jersey St. R. Co. v. Jersey City*, — N. J. —, 67 Atl. 1072.

[2] — *Prima facie* weight of findings of fact.

In any action to enforce an order of the Interstate Commerce Commission, in case of conflicting evidence a probative force must be attributed to the findings of the Commission, which, in addition to "knowledge of conditions, of environment and of transportation relations," has

had the witnesses before it and has been able to judge of them and their manner of testifying.—*Illinois Cent. R. Co. v. Interst. Com. Commission*, 206 U. S. 441, 27 Sup. Ct. R. (U. S.) 700, affg. s. c. 10 Inters. Com. R. 505.

The findings of Interstate Commerce Commission are *prima facie* true, and the court will ascribe to them the strength due to the judgments of a tribunal appointed by law and especially qualified by experience.—*Illinois Cent. R. Co. v. Interst. Com. Commission*, 206 U. S. 441, 27 Sup. Ct. R. (U. S.) 700.

The Interstate Commerce Act gives *prima facie* effect to the findings of the Interstate Commerce Commission, and when those findings are concurred in by the Circuit Court of the United States, the Supreme Court will not interfere unless the record establishes that clear and unmistakable error has been committed.—*Cincinnati, H. & D. R. Co. v. Interstate Com. Commission*, 206 U. S. 142, 27 Sup. Ct. R. (U. S.) 648.

Where the facts as to an order of a state commission are settled by the state court, such findings are conclusive upon the Supreme Court of the United States.—*Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. R. (U. S.) 360, affg. s. c. 97 Tex. 274, 78 S. W. 495.

Where the decision of questions of fact is committed by Congress to the judgment and discretion of a head of a department, his decision thereon is conclusive; and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.—*Bates Co. v. Payne*, 194 U. S. 106, 24 Sup. Ct. R. (U. S.) 595.

The findings of fact in the decisions of the Interstate Commerce Commission are *prima facie* evidence of the matters stated therein; and the conclusions of the commission based upon such findings are presumed to be well founded and correct, and they will not be set aside unless error clearly appears.—*Interst. Com. Commission v. L. & N. R. Co.*, 102 Fed. 709; *Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409; *Interst. Com. Commission v. C. N. O. & T. P. R. Co.*, 56 Fed. 925.

In an application to the Circuit Court by the Interstate Commerce Commission for judicial enforcement of an order of the Commission directing certain carriers to desist from charging a less rate for a longer than for a shorter haul, the findings of fact reported by the Commission are not conclusive, but are merely *prima facie* evidence, subject to being modified or disproved by other evidence offered in court at the hearing.—*Interst. Com. Commission v. A. T. & S. F. R. Co.*, 50 Fed. 295; appeal dismissed, 81 Fed. 1005, 149 U. S. 264, 13 Sup. Ct. R. (U. S.) 837.

In a proceeding by the Interstate Commerce Commission under Interst. Com. Act, § 16, to enforce an order, the findings of fact by the Commission are merely *prima facie* evidence of the facts therein stated, the rule being the same whether the proceeding is instituted by the Commission or by an individual.—*Interst. Com. Commission v. Lehigh V. R. Co.*, 49 Fed. 177.

The findings and reports of the Interstate Commerce Commission are merely given the weight of *prima facie* evidence, in proceedings to enforce its orders.—*Kentucky & I. Bridge Co. v. L. & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289, appeal dismissed, 149 U. S. 777, 13 Sup. Ct. R. (U. S.) 1048.

The statutes of Minnesota provide for an appeal from orders of the Railroad and Warehouse Commission.—*Held*, that in a case where no appeal is taken, the order objected to is not conclusive on the facts.—*State v. Minneapolis & St. L. R. Co.*, 80 Minn. 191, 83 N. W. 60.

Findings of fact by a state railroad commission are *prima facie* evidence, but in case the truth thereof is denied, the issue must be determined like any other controversy of fact.—*State v. Fremont E. & M. V. R. Co.*, 23 Neb. 117, 36 N. W. 305.

An act making certain facts *prima facie* evidence of certain other facts is unconstitutional.—*State v. Beswick*, 13 R. I. 213.

The question of the reasonableness of rates or regulations is not a question whether they are confiscatory and take private property without just compensation, for that is the question of constitutionality. Their reasonableness is to be determined as in any other class of litigation, except that the commission's findings of fact are conclusive.—*Railroad Commission v. Houston & T. C. R. Co.*, 90 Tex. 340, 38 S. W. 750.

[3] — Upon whom binding.

A lawful order of the Interstate Commerce Commission, directing certain railroad companies to cease making specified unlawful freight charges under a joint traffic agreement is binding on the successor of one of such companies, although the name of such successor does not appear in the order.—*Behlmer v. L. & N. R. Co.*, 83 Fed. 898, revg. s. c. 71 Fed. 835; revd. on other points, 175 U. S. 648, 20 Sup. Ct. R. (U. S.) 209.

A lawful order of the Interstate Commerce Commission against discrimination by a railroad, is binding upon the latter's successors.—*Inters. Com. Commission v. W. N. Y. & P. R. Co.*, 82 Fed. 192.

[4] — Suspension by commission.

The Interstate Commerce Commission may make an order and then suspend it pending indicated action by the carrier.—*Board of Trade of*

Chattanooga v. E. Tenn. V. & G. R. Co., 2 Inters. Com. R. 798, 3 Inters. Com. R. 106, 213, 5 Inters. Com. R. 546.

[5] Judicial review of orders — In general.

Review of determination as to granting of certificate of public convenience and necessity,—see post, § 53, note [6].

Review of proceedings of former N. Y. Board of Railroad Commissioners in granting an application to discontinue a station,—see post, § 80, note.

The decisions of the Interstate Commerce Commission are subject to review if that body excluded "facts and circumstances that ought to have been considered," but they will not, after they are concurred in by the Circuit Court and the Circuit Court of Appeals, be reversed unless the record establishes that clear and unmistakable error has been committed.—*Illinois Cent. R. Co. v. Interst. Com. Commission*, 206 U. S. 441, 27 Sup. Ct. R. (U. S.) 700.

The courts may look through and behind mere forms, and interfere whenever necessary, for the protection of private rights against an illegal, arbitrary exercise of governmental power.—*West Chicago St. R. Co. v. Chicago*, 201 U. S. 506, 26 Sup. Ct. R. (U. S.) 518.

Whether, in a particular case, there has been an undue preference or discrimination, is a question of fact depending on the matters proved in each case, and the Circuit Court has jurisdiction to review the findings of the Commission on these questions of fact, giving effect to those findings as *prima facie* evidence of the facts and conclusions set forth therein.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45, affg. s. c. 74 Fed. 715, 69 Fed. 227.

A legislature has the power to fix rates, and the extent of judicial interference should be protection against unreasonable rates. Courts should be careful not to declare legislative acts unconstitutional upon agreed and general statements and without the fullest disclosure of all material facts. By means of a friendly suit, a party beaten in the legislature should not be encouraged to transfer to the courts an inquiry as to the constitutionality of legislation he was unable to argue successfully against in the legislature. Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates to be unconstitutional, on the ground that its enforcement would deprive the stockholders of dividends on their investment and the bondholders of interest on their loans, the courts should be fully advised as to what is done with the receipts and earnings of the company, for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest and to the stockholders reasonable divi-

dends. While the protection of the vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call operating expenses.—*Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. R. (U. S.) 400, affg. s. c. 83 Mich. 592, 47 N. W. 489.

In an action under Interst. Com. Act, § 16, to enforce an order of the Commission, the court has no revisory power over the order.—*Inters. Com. Commission v. D. L. & W. R. Co.*, 64 Fed. 723.

A statute giving a commission the power to conduct an investigation as to reasonable charges and to fix a maximum rate is not invalid merely because the determination is made partly upon hearsay evidence, since, even if the right of appeal given does not sufficiently protect the defendant, such appeal is not an exclusive remedy, but there is always the right to proceed by affirmative action to enjoin the enforcement of the commission's orders.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Sup. 341, rev'd. on other grounds, 191 N. Y. 123, 83 N. E. 693.

The safety of free government rests upon the independence of each branch of government, and requires that each department should be free from interference, in the discharge of its peculiar duties, by either of the others.—*People ex rel. Burby v. Howland*, 155 N. Y. 270, 49 N. E. 775, 41 L. R. A. 838.

Review of the proceedings before a state railroad commission, to determine the reasonableness of rates fixed by it, is a judicial function, which may properly be required of the courts.—*Chicago, I. & L. R. Co. v. R. R. Comrs.*, 38 Ind. App. 439, 78 N. E. 338.

The orders of the Corporation Commission of North Carolina as to rates, etc., are subject to review by the courts.—*Corporation Commission v. Atlantic Coast L. R. Co.*, 139 N. C. 126, 51 N. E. 793.

[6] — Acts of administrative tribunals.

A state assessing board, in determining the value of railway property for certain purposes of taxation, took into account the returns furnished by the corporations and their respective stocks, bonds, properties, earnings, etc.—*Held*, that the court will not consider complaints as to results reached by the board, except those based on fraud or the clear adoption of a fundamentally wrong principle.—*Chicago, B. & Q. R. Co. v. Babcock*, 204 U. S. 585, 27 Sup. Ct. R. (U. S.) 326.

The determinations of the state and municipal civil service commission are not final, but are subject to a limited and qualified judicial control.—*People ex rel. Schau v. McWilliams*, 185 N. Y. 92, 77 N. E. 785.

The courts can review the acts of inferior tribunals possessing powers of a judicial nature.—*People ex rel. Smith v. Hoffman*, 166 N. Y. 462, 60 N. E. 187, 54 L. R. A. 597, revg. s. c. 55 App. Div. (N. Y.) 260, 68 N. Y. Supp. 884, 32 Misc. (N. Y.) 379, 66 N. Y. Supp. 2.

Decisions of the N. Y. Military Board of Examination are reviewable judicially, unless expressly excepted from such review.—*People ex rel. Smith v. Hoffman*, 166 N. Y. 462, 60 N. E. 187, 54 L. R. A. 597, revg. s. c. 55 App. Div. (N. Y.) 260, 68 N. Y. Supp. 884, 32 Misc. (N. Y.) 379, 66 N. Y. Supp. 2.

A decision of the N. Y. Board of Railroad Commissioners granting a certificate of public convenience and necessity, is judicially reviewable.—*People ex rel. Steward v. Board of R. R. Comrs.*, 160 N. Y. 202, 54 N. E. 697, affg. s. c. 40 App. Div. (N. Y.) 559, 58 N. Y. Supp. 94.

Certiorari may be issued to review the judicial determinations of inferior tribunals and officers, acting under statutory authority. Decisions of the N. Y. Board of Railroad Commissioners may be thus reviewed.—*People ex rel. Loughran v. Board of R. R. Comrs.*, 158 N. Y. 421, 53 N. E. 163, affg. s. c. 32 App. Div. (N. Y.) 158, 52 N. Y. Supp. 901.

Decisions of the Commissioners of the Land Office as to questions of fact are judicially reviewable by *certiorari*.—*People ex rel. Burnham v. Jones*, 112 N. Y. 597, 20 N. E. 577, modifying and affg. s. c. 49 Hun (N. Y.), 365, 2 N. Y. Supp. 148.

Decisions rendered by New York Board of Fire Department Examiners are not judicially reviewable, even though unreasonable, unless they are wholly impracticable or beyond the scope of its authority.—*N. Y. Fire Dept. v. Atlas Ss. Co.*, 106 N. Y. 566, 13 N. E. 329.

An appeal will not lie to the Supreme Court to review questions of fact passed on by commissioners appointed under N. Y. R. R. L., § 22.—*Matter of N. Y. L. E. & W. R. Co.*, 99 N. Y. 388, 2 N. E. 35.

The action of the Board of Railroad Commissioners, under N. Y. R. R. L., § 100, in permitting a street railroad to change its motive power, is judicially reviewable.—*People ex rel. Babylon R. Co. v. Board of R. R. Comrs.*, 32 App. Div. (N. Y.) 179, 52 N. Y. Supp. 908; affd. 158 N. Y. 711, 53 N. E. 1129.

[7] — Constitutional questions.

The Fifth Amendment to the Constitution of the United States is not restrictive of state, but only of national action.—*Hunter v. Pittsburgh*, 207 U. S. 161, 28 Sup. Ct. R. (U. S.) 40.

The provisions of the Fourteenth Amendment to the Constitution of the United States are not confined to the action of the State through

legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition.—*Raymond v. Chicago Traction Co.*, 207 U. S. 20, 28 Sup. Ct. R. (U. S.) 7, affg. s. c. 114 Fed. 557.

Whenever the power of regulation of railroad corporations is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the "due process" and "equal protection" clauses of the U. S. Constitution.—*Atlantic C. L. R. Co. v. N. Carolina Corp. Commission*, 206 U. S. 1, 27 Sup. Ct. R. (U. S.) 585, affg. s. c. 137 N. C. 1, 49 S. E. 191.

Acts of state officers in violation of the provisions of state law and in opposition to plain prohibitions therein are not acts of the state to which the provisions of the Fourteenth Amendment to the Federal Constitution are applicable.—*Barney v. City of New York*, 193 U. S. 430, 24 Sup. Ct. R. (U. S.) 502.

The question of what rates are reasonable could be more easily determined by a commission composed of persons whose special skill, observation and experience qualifies them to handle great problems of transportation, but the court cannot shrink from the duty of determining whether it is true, as alleged, that a state statute invades rights secured by the supreme law of the land.—*Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. R. (U. S.) 418, affg. s. c. 64 Fed. 165.

There is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business. Especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the U. S. Constitution, as depriving the companies of their property without due process of law, and as denying them the equal protection of the laws.—*St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. R. (U. S.) 484, affg. s. c. 54 Ark. 101, 15 S. W. 18.

The legislative determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.—*Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. R. 499; *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302.

Under the pretence of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to a taking of private

property without due process of law.—*Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 6 Sup. Ct. R. (U. S.) 334, 388, 1191.

Any law which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it.—*Ogden v. Saunders*, 12 Wheat. (U. S.) 256; *McCracken v. Hayward*, 2 How. (U. S.) 612; *People v. Otis*, 90 N. Y. 48.

A court of first instance, save in a clear case of legislative error, may well leave to an appellate court the avoidance of a statute for unconstitutionality.—*Michie v. N. Y. N. H. & H. R. Co.*, 151 Fed. 694.

A carrier has no right to earn a return upon its investment, except as it may do so in operating its property in conformity to the law.—*Brewer v. L. & N. R. Co.*, 7 Inters. Com. R. 224.

The rights of "liberty" and "property" are sacred and substantial rights guaranteed by the federal and state constitutions. Any law which interferes with the right to make and enforce contracts affects both the liberty and property of the citizen.—*Wright v. Hart*. 182 N. Y. 330, 75 N. E. 404.

The contention that a railroad regulation act invades property rights protected by the state or federal constitutions, is not available in the Court of Appeals unless it has been raised below.—*Purdy v. Erie R. Co.*, 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669, affg. s. c. 33 App. Div. (N. Y.) 643, 54 N. Y. Supp. 1114.

A regulative measure is not necessarily unconstitutional because it to some extent interferes with "liberty" or "property."—*People v. Havnor*, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689.

"Property" may be interfered with without an actual or physical taking or property, and "liberty" may be interfered with without any actual restraint of the person.—*Matter of Jacobs*, 98 N. Y. 98.

Depriving an owner of property of one of its essential attributes, is depriving him of his property within the constitutional provision, and a legislative declaration that upon publication of notice, a negotiable security shall not longer be transferrable, is not due process of law, working a forfeiture of the right given by the contract.—*People v. Otis*, 90 N. Y. 48.

"Due process of law" and "taking of private property" will be given a broad and liberal interpretation.—*Bertholf v. O'Reilly*, 74 N. Y. 509, affg. s. c. 8 Hun (N. Y.), 16.

That a statute impairs the value of property does not necessarily render it unconstitutional.—*Bertholf v. O'Reilly*, 74 N. Y. 509, affg. s. c. 8 Hun (N. Y.), 16.

"Due process of law" means in the due course of legal proceedings, according to those rules and forms which have been established for the

protection of private rights, not such an act as the legislature may, in the uncontrolled exercise of its power, think fit to pass.—*Westervelt v. Gregg*, 12 N. Y. 202.

The courts have no power to lower or interfere with a rate fixed by the legislature, unless it violates same provision of the Constitution.—*Brooklyn Union Gas Co. v. New York*, 115 App. Div. (N. Y.) 69, 100 N. Y. Supp. 625; *affd.* 188 N. Y. 334, 81 N. E. 141.

The remedy against legislative encroachments on the Constitution is to be sought from the judiciary.—*Hanlon v. Supervisors*, 57 Barb. (N. Y.) 383.

The court cannot enjoin the acts of a state railroad commission as to matters committed to its discretion, even though such acts deny constitutional guaranties, but relief, if any, must be had in other ways.—*Railroad Comrs. v. Pensacola & A. R. Co.*, 24 Fla. 417, 5 So. 129, 2 L. R. A. 504.

The court will not decide a transportation act to be unconstitutional unless a decision on that point is absolutely necessary to a disposition of a cause upon its merits.—*Chicago, I. & L. R. Co. v. Hunt*, — Ind. App. —, 79 N. E. 927.

To warrant the courts in interfering to determine the reasonableness of a rate fixed by a state legislature or commission, it should clearly appear that the rate fixed is so grossly inadequate as to be confiscatory and so in violation of the Constitution.—*Steenerson v. Gt. Northern R. Co.*, 69 Minn. 353, 72 N. W. 713.

The statute creating the Virginia Corporation Commission does not deny the equal protection of the laws to the companies subjected to the control of that commission, since the jurisdiction complained of applies to all persons or companies engaged in the business transportation and there is no discrimination in favor of or against any one carrier.—*Winchester & S. R. Co. v. Commonwealth*, 106 Va. 264, 55 S. E. 692.

Questions whether a general statute of a state encroaches upon the commerce clause of the U. S. Constitution will be decided only in particular cases and not in the abstract.—*Atlantic C. L. R. Co. v. Commonwealth*, 102 Va. 599, 46 S. E. 911.

[8] — Acts done pursuant to police power.

The exercise of the police power is subject to judicial review.—*Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. R. (U. S.) 18.

In the exercise of the police power of the state, which aims at the suppression of whatever is contrary to public policy or inimical to the public interests, the legislature is vested with a large discretion, which if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry.—*Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677,

16 Sup. Ct. R. (U. S.) 714, affg. s. c. 97 Ky. 675, 17 Ky. L. R. 427, 31 S. W. 476.

The 14th amendment to the U. S. Constitution cannot be invoked to limit the police power of a state.—*Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. R. (U. S.) 357.

The police power only begins where the Constitution ends, and the police power of the state, broad as it is, cannot sustain a legislative act which infringes constitutional guaranties.—*Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404.

Acts passed to protect the public safety, health, comfort, etc., are within the legislative discretion, and not subject to judicial review, if legitimately intended for the purposes indicated.—*People v. Gillson*, 109 N. Y. 389, 17 N. E. 343.

The legislative authority to make regulations for the public health, safety, etc., is subject to judicial scrutiny whether it infringes constitutional guaranties.—*In re Jacobs*, 98 N. Y. 98, affg. s. c. 33 Hun (N. Y.), 374.

It is always a judicial question if any particular regulation is a valid exercise of police power, though the authority of the courts to declare a regulation invalid will be exercised with the utmost caution, and only when it is clear that the ordinance or law declared void passes the limits of the police power and infringes upon rights guaranteed by the Constitution.—*In re Smith*, 143 Cal. 368, 77 Pac. 180.

The Fencing Act is a police regulation to which railroads are subjected by the sovereignty of the state; and it is not within the rightful jurisdiction of any court, state or federal, to arrest the operation of such a law.—*Ohio & M. R. Co. v. Russell*, 115 Ill. 52, 3 N. E. 561.

[9] — Rates and service.

Whether courts will review the decisions of the Interstate Commerce Commission on mixed questions of law and fact. See *Illinois Cent. R. Co. v. Interst. Com. Commission*, 206 U. S. 441, 27 Sup. Ct. R. (U. S.) 700, affg. s. c. 10 Inters. Com. R. 505.

An order merely equalizing rates is not open to the objection that it compels a carrier to do business at a loss, and so takes his property without due process of law.—*Atlantic C. L. R. Co. v. Florida*, 203 U. S. 256, 27 Sup. Ct. R. (U. S.) 108, affg. s. c. 48 Fla. 146, 37 So. 657; *Seaboard Air L. R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, affg. s. c. 48 Fla. 129, 37 So. 314, 48 Fla. 150, 37 So. 658.

The judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement a taking of property without

just compensation.—*San Diego Land Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. R. (U. S.) 804, affg. s. c. 74 Fed. 79.

The question of the reasonableness of a rate of charge for transportation by a railroad company is eminently a question for judicial investigation, requiring due process of law for its determination.—*Chicago & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. R. (U. S.) 462, 702, revg. s. c. 38 Minn. 281, 37 N. W. 782.

Courts will not attempt to formulate and prescribe a course of business as to rates and facilities.—*Express Cases*, 117 U. S. 1, 6 Sup. Ct. R. (U. S.) 542, 628, revg. s. c. 10 Fed. 210, 869, revg. s. c. 2 Fed. 465, 18 Fed. 517.

The Interstate Commerce Act is not unconstitutional as attempting to vest judicial powers in the Interstate Commerce Commission, as that law does not purport to deprive the courts of their jurisdiction at the suit of a shipper to ultimately determine the question of the reasonableness or unreasonableness of a rate.—*U. S. v. Standard Oil Co.*, 155 Fed. 305.

The functions of a state railroad commission vested with power to fix rates, etc., are not so purely legislative as to make it not amenable to the control of the courts when it attempts to enforce unjust rates.—*Southern Pac. Co. v. Board of R. R. Comrs.*, 78 Fed. 236.

The reasonableness of rates fixed by a municipal ordinance as maximum rates for gas companies is a matter for judicial determination and review.—*Capital City Gas Co. v. City of Des Moines*, 72 Fed. 818.

The right of judicial interference with rates exists only when the schedule established will fail to secure to the owners of the property some income or compensation from their investment. As to the amount of such compensation, the legislature is the sole judge. Whether by reducing compensation to a minimum, railroad enterprises shall be discouraged, or by enlarging, encouraged, is a matter for legislative, not judicial determination.—*Chicago & N. W. R. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744n.

The provision of the N. Y. Gas and El. Com. Act that the rates fixed by the Commission shall be the maximum price for three years and until upon complaint the Commission shall fix a new price is a violation of the fourteenth amendment to the U. S. Constitution.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123, 83 N. E. 693, revg. s. c. 122 App. Div. (N. Y.) 203, 107 N. Y. Sup. 341.

Whether the elevated and steam surface railroads within a city should be placed upon the same basis with street surface railroads as to fares and the transfer of passengers, is for the determination of the legislature, not the courts.—*People v. Brooklyn Heights R. Co.*, 187 N. Y. 48, 79 N. E. 838.

If the power to legislate to fix a rate exists, the court has nothing to do with the policy or wisdom of the interference in the particular case, or with the question of the adequacy or inadequacy of the compensation authorized.—*People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559n; *affd.* 143 U. S. 517, 12 Sup. Ct. R. (U. S.) 468.

The claim that a rate fixed by the legislature is excessive is a thing to be addressed to the next legislature, not to the courts.—*Brooklyn Union Gas Co. v. New York*, 115 App. Div. (N. Y.) 69, 100 N. Y. Supp. 625; *affd.* 188 N. Y. 334, 81 N. E. 141.

When the legislature has fixed the maximum rate which a public service corporation may charge, the courts have no power to inquire whether the statutory rate is excessive.—*Brooklyn Union Gas Co. v. New York*, 115 App. Div. (N. Y.) 69, 100 N. Y. Supp. 625; *affd.* 188 N. Y. 334, 81 N. E. 141.

A corporation may at any time have recourse to the state or federal courts to test the validity of an enactment of the legislature prescribing or regulating the rates to be charged for gas, upon the ground that it is so low that it will deprive the stockholders of the right to a reasonable profit.—*Richman v. Consolidated Gas Co.*, 114 App. Div. (N. Y.) 216, 100 N. Y. Supp. 81; *affd.* 186 N. Y. 209, 78 N. E. 871.

An order of the state Board of Railroad Commissioners that a railroad furnish certain accommodations for freight may be reviewed by the court as to its justice and reasonableness.—*People v. D. & H. C. Co.*, 32 App. Div. (N. Y.) 120, 52 N. Y. Supp. 850; *affd.* 165 N. Y. 362, 59 N. E. 138.

The court has no right to interfere with rates fixed by legislative authority, solely on the ground of their unreasonableness. Fraud, arbitrary action, and violation of constitutional guaranties are the sole grounds for equitable interference.—*Spring Valley W. W. v. San Francisco*, 82 Cal. 286, 22 Pac. 910, 6 L. R. A. 756.

The power of the legislative department to regulate the compensation charged for public services by franchise-holding corporations is subject to the limitation that such compensation must be reasonable, and it is a proper subject of judicial inquiry and determination whether under the guise of regulation such compensation has not been made so inadequate as to practically result in confiscation.—*Leadville Water Co. v. Leadville*, 22 Col. 297, 45 Pac. 362.

In an appeal to the courts from an action of a state railroad commission, the court has to determine (1) whether the rates were fixed in due form; (2) whether the law under which the commission acted is valid; (3) whether the rates themselves are reasonable and hence valid.—*Chicago, I. & L. R. Co. v. Hunt*, — Ind. App. —, 79 N. E. 927.

The final test of the reasonableness of rates fixed by a state commission is with the judiciary.—*Stone v. N. J. & C. R. Co.*, 62 Miss. 646.

The courts have no general supervisory jurisdiction over passenger and freight rates.—*Raritan R. R. Co. v. Middlesex & S. T. Co.*, 70 N. J. L. 732, 58 Atl. 332.

Under the Texas statute, the courts may review as to their reasonableness, the rates fixed by the state Railroad Commission, even though it is not contended that such rates are confiscatory or violative of constitutional guaranties.—*Railroad Commission of Texas v. Weld*, 7 Tex. Ct. R. 122, 73 S. W. 529, revg. s. c. 3 Tex. Ct. R. 805, 4 Tex. Ct. R. 302, 68 S. W. 1117.

It is for the courts to determine whether rates and regulations prescribed under legislative authority are reasonable and proper—*City of Madison v. Madison Gas & Elect. Co.*, 129 Wis. 249, 108 N. W. 65.

[10] Judicial restraint of orders—In general.

The judiciary ought not to interfere with rates fixed under legislative authority unless they are so plainly unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as, under the circumstances, is just both to the owner and the public.—*San Diego L. & T. Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. R. (U. S.) 804, affg. 74 Fed. 79; *Cedar Rapids W. Co. v. Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081.

Courts have the power to inquire whether a body of rates prescribed by legislative authority is unjust and unreasonable and such as to work a practical destruction of rights of property, and if found so to be, to restrain its operation.—*Covington & L. Turnpike Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. R. (U. S.) 198.

A court of equity cannot properly interfere with, or in advance restrain, the discretion of a governmental body in the exercise of legislative powers granted to it by the state.—*New Orleans W. W. Co. v. New Orleans*, 164 U. S. 471, 17 Sup. Ct. R. (U. S.) 161.

There is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the property of companies engaged in the carrying business, by making it impossible to earn fair returns thereon.—*St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. R. (U. S.) 484, affg. 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452n.

A court of equity may restrain the enforcement of rates found unreasonable, but has no power to fix new ones, or to enjoin a commission from establishing new ones.—*Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. R. (U. S.) 1047.

Federal courts have jurisdiction to set aside or suspend an order of the Interstate Commerce Commission which results from misconception or misapplication of the law to conceded or undisputed facts. Decision of the U. S. Circuit Court of the 8th Circuit, June 30, 1908, — Fed. —.

A state railroad commission is subject to suit in a court of competent jurisdiction in respect to its orders, rules and regulations.— *Central of Ga. R. Co. v. McLendon*, 157 Fed. 961.

It is not unnatural that a body having the powers of a corporation commission should imagine itself the state, but it is in reality a mere agency of the state, and may be restrained from executing an unconstitutional act, or from doing an unconstitutional thing under a constitutional act.— *Southern R. Co. v. Greensboro I. & C. Co.*, 134 Fed. 82; affd. 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722.

The judiciary ought not to interfere with rates established under legislative sanction, where the body making the rate has the power to act, unless they are plainly and palpably so unreasonable as to make their enforcement equivalent to depriving the complainant of reasonable returns on its investment.— *Palatka Waterworks v. City of Palatka*, 127 Fed. 161.

The courts may enjoin the enforcement of rates made by a state railroad commission.— *Louisville & N. R. Co. v. Brown*, 123 Fed. 946.

Whether rates complained of, made by a state commission, are reasonable, etc., is not open to judicial inquiry, in a suit to enjoin the discretionary action of the commissioners in fixing such rates.— *Railroad Comrs. v. Pensacola & A. R. Co.*, 24 Fla. 417, 5 So. 129, 2 L. R. A. 504.

The courts may determine, on an application for an injunction, whether the rates fixed by legislative authority as the maximum charges for gas are just and reasonable.— *People's Gas L. & C. Co. v. Hale*, 94 Ill. App. 406.

[11] — Grounds for equitable relief.

An order merely equalizing rates should not be enjoined on the ground that it compels a carrier to do business at a loss and so takes his property without due process of law.— *Atlantic C. L. R. Co. v. Florida*, 203 U. S. 256, 27 Sup. Ct. R. (U. S.) 108, affg. s. c. 48 Fla. 146, 37 So. 657; *Seaboard Air L. R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, affg. s. c. 48 Fla. 129, 37 So. 314, 48 Fla. 150, 37 So. 658.

That failure to obey an unauthorized and void order of a state railroad commission would subject the company to large numbers of individual actions and heavy penalties, gives a court jurisdiction to enjoin enforcement of the order, to avoid multiplicity of suits and afford a more efficacious remedy than could be had at law.— *Louisville & N. R. Co. v. Smith*, 128 Fed. 1.

A bill in equity by a gas corporation to restrain a state gas commission and the attorney general of the state from enforcing an order of that commission as to rates, is an appropriate method for testing the validity of such order, in order that a multiplicity of suits may be avoided and the corporation may suffer no irreparable injury.—*Haverhill Gaslight Co. v. Barker*, 109 Fed. 694.

In a court proceeding as to the reasonableness of rates fixed by the North Dakota Commission, a showing that if the schedule as proposed had been in operation during the past four years, the business of the roads would have been done at an actual loss, and nothing left for a return on the investment and property used, demands that the enforcement of the rates be restrained as unreasonably low.—*Northern Pac. R. Co. v. Keyes*, 91 Fed. 47.

That a decision of a state railroad commission was induced by the governor, who was not a member thereof, is no reason for interfering with the enforcement of such order.—*Wilmington & W. R. Co. v. R. R. Comrs.*, 90 Fed. 33.

Bondholders seeking relief, by injunction, against the enforcement of an ordinance fixing rates of fare on a street railroad, have a sufficient interest in the matter to give them a standing in court, if they show a well-grounded apprehension of loss by the enforcement of the ordinance.—*Old Colony T. Co. v. City of Atlanta*, 83 Fed. 39; *affd.* 88 Fed. 859.

That a member of a state railroad commission, before appointment and as a condition of such appointment, had pledged himself to make the changes in rates complained of, is immaterial in determining their validity, since the only question is that of their reasonableness.—*Southern Pac. Co. v. Board of R. R. Comrs.*, 78 Fed. 236.

It is not a defense to a proceeding to restrain the enforcement of an unreasonable rate that the reduced rate may increase the volume of business and hence make it more profitable than at present, as the courts must decide in the light of existing, not hypothetical and speculative, conditions.—*Chicago & N. W. R. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744n.

The right to regulate is not unlimited, and if the schedule be made so low that its adoption will operate as a confiscation of the property without due process of law, the courts will interfere to prevent its enforcement.—*Cedar Rapids W. Co. v. Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081.

Allegations that a state board of transportation is proceeding to interfere with plaintiff's rights in a manner for which there is no adequate remedy at law, or which may cause multiplicity of suits, and

which alleges that the law under which the board is proceeding is unconstitutional, make out a case for equitable restraint of further action.—*Pacific Exp. Co. v. Cornell*, 59 Neb. 364, 81 N. W. 377.

[12] — When temporary restraining order will be granted.

Where the New York Gas and Electricity Commission has ordered a reduction in the price of gas, which reduction is resisted on the ground that it would deprive the gas company of property without due process, a preliminary injunction will be granted restraining a municipality, which is a consumer of the gas, from enforcing the order pending an action to test the constitutionality of the same, the difference between the old and new rate to be impounded in court awaiting the outcome of the suit, it appearing that irreparable injury will result from the enforcement of the order during the pendency of the suit.—*Buffalo Gas Co. v. City of Buffalo*, 156 Fed. 370.

The granting of a temporary restraining order, under U. S. Rev. Stat. § 718 (U. S. Comp. Stat. 1901, p. 580), against a rate fixed by a state commission, is within the sound judicial discretion of the court.—*Central of Ga. R. Co. v. McLendon*, 155 Fed. 974.

It is the duty of a court of equity to restrain *pendente lite* the enforcement of a rate regulation act which is alleged to be unconstitutional, when it is shown by the proof that the complainant will, pending a final hearing, suffer irreparable injury.—*Southern R. Co. v. McNeill*, 155 Fed. 756.

The N. Y. Gas and Electricity Commission Act provided that "if it shall be alleged and established in any action brought in any court for the collection of any charge for gas or electricity, that a price has been demanded in excess of that fixed by commission or by statute in the municipality wherein the action arose, no recovery shall be had therein, but the fact of such excessive charge shall be a complete defense." By L. 1906, ch. 125, the legislature fixed 80 cents per 1,000 feet as the maximum price which might be charged for gas in the Borough of Manhattan, and further provided that any corporation or person charging a larger sum should forfeit \$1,000 for each offense, it being made the duty of the defendant public officers to sue for such penalties.—*Held*, that while the lawfulness of this legislature-made rate is being determined by the courts, these provisions subjecting the gas company to ruinous penalties would amount to a denial of due process and the equal protection of laws, and the court will grant a temporary injunction restraining the officers charged with that duty from attempting to enforce such penalties, etc., until the final decision as to the constitutionality of the act; all sums, however, to be impounded in the custody of some officer of the court to await the outcome of the suit.—*Consolidated Gas Co. v. Mayer*, 146 Fed. 150.

Upon a *prima facie* showing that for 19 years it has earned less than the legal interest, and on giving an indemnification bond *pendente lite*, a railroad is entitled to a preliminary injunction restraining reductions in rates ordered by a state railroad commission.—*Louisville & N. R. Co. v. Brown*, 123 Fed. 946.

In determining whether a preliminary injunction should be granted to restrain putting into effect rates declared to be confiscatory, the discretion of the judge should be regulated by the balance of inconvenience or injury to one party or the other.—*New Memphis Gas Co. v. Memphis*, 72 Fed. 952.

Where on the hearing it seems probable that the effect of putting in force a schedule of rates prescribed by a state board of railroad commissioners will be to deprive the complainant of all compensation for the operation of the roads, and the law provides for treble damages, attorneys' fees, etc., to any shipper showing injury by an excessive rate, the restraining order will be continued in a preliminary injunction until the final hearing.—*Chicago & N. W. R. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744n.

[13] — When a temporary restraining order will be denied.

A rate had been fixed by the Railroad Commission of Louisiana and this the company contended was too low.—*Held*, that it was not proper to grant the company a restraining order to prevent the enforcing of such rate and to allow the higher rate contended for by the company.—*Cumberland T. & T. Co. v. R. R. Comm.*, 156 Fed. 834.

The Georgia Railroad Commission fixed a 2½ cents per mile maximum rate, to go into effect three months from the making of the order. A bill for an injunction was presented two days before the expiration of that time.—*Held*, that a temporary restraining order would not be granted. If resort to the court had been made in a reasonable time, there would have been no occasion to ask *ex parte* for a temporary restraining order.—*Central of Ga. R. Co. v. McLendon*, 155 Fed. 974.

The U. S. Circuit Court will not suspend or supersede a decree enjoining carriers from violating an order of the Interstate Commerce Commission, made in a suit brought by the Commission under Interst. Com. Act, § 16, during the pendency of a contemplated appeal from such decree, where it has not been made to appear that the damage to the carrier from the enforcement of the decree will be any greater than would be the damage to the shippers from its suspension.—*Interst. Com. Commission v. So. Pac. Co.*, 137 Fed. 606; *revd. on other grounds*, 200 U. S. 536, 26 Sup. Ct. R. (U. S.) 330.

Where the plaintiff has not shown, in behalf of his motion for a preliminary injunction, that either the stockholders or the railway cor-

poration will suffer irreparable injury before a final hearing can be had in the cause, a preliminary injunction will not be granted to restrain the enforcement of a statute regulating fares on street railroads upon the application of a stockholder in the company, although the court confesses a grave doubt as to the constitutionality of the act and the constitutional question has been raised.—*Ahern v. Newton & B. St. R. Co.*, 105 Fed. 702. '

A gas company asked that the city be restrained from enforcing an ordinance fixing the price of gas, on the ground of the unreasonableness of such rates. On the application for a temporary injunction, the proof left some doubt what amount was to be regarded as the company's investment, as well as to the actual cost of producing the gas. It did appear, however, that the prices fixed would permit some profit over cost of production; that its actual effect upon income, by increasing consumption and so the net profits, or the reverse, could not be known, except by experience; that a final hearing, upon full proof, could be had without great delay.—*Held*, that the preliminary injunction should be refused.—*Capital City Gas Co. v. City of Des Moines*, 72 Fed. 829.

After plaintiff had brought action in the Supreme Court to compel an electrical corporation to restore its wire connections with his house, defendant asked that court to grant an interlocutory order restraining the plaintiff from prosecuting in municipal court an action to recover from the defendant certain statutory penalties for refusing electric light to him.—*Held*, even if the court has power to stay proceedings in another and inferior tribunal, the power can be justified only in an extreme emergency.—*Gould v. Edison Elect. Ill. Co.*, 26 Misc. (N. Y.) 64, 56 N. Y. Supp. 465.

[14] — Premature application.

Under the statutes of Kentucky, the duty of enforcing rates made by the state railroad commission rests on the commission itself, and a railroad is not entitled to an injunction against the commission before the rates are fixed at all, on the ground that unless equity interferes, a multiplicity of suits and irreparable injury will result.—*McChord v. L. & N. R. Co.*, 183 U. S. 483, 22 Sup. Ct. R. (U. S.) 165.

The federal courts will not enjoin a carrier from putting into effect a proposed schedule of rates pending a decision of the Interstate Commerce Commission, in a proceeding theretofore instituted, as to the reasonableness and justice of such rates, since the Commission possesses no power to pass upon the lawfulness of rates merely threatened to be put into effect.—*Jewett v. Ch. M. & St. P. R. Co.*, 156 Fed. 160.

The court will not restrain a railroad commission from putting into effect contemplated rates until the final investigation as to such rates has

been held by the commission, and the rates embodied in a formally uttered order or schedule.—*Southern Pac. Co. v. Board of R. R. Comrs.*, 78 Fed. 236; explained, 183 U. S. 483, 22 Sup. Ct. R. (U. S.) 165.

Where a state board of railroad commissioners has advertised in the state papers that a schedule of rates prescribed by them will take effect on a day specified, the court may, on the application of the carrier, restrain such putting in effect, even before the arrival of the day indicated, on the ground of preventing multiplicity of suits.—*Chicago & N. W. R. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744n.

[15] — Where petitioner is an unlawful monopoly.

A gas company sued to restrain the enforcement of an ordinance fixing rates and a master found the rates confiscatory. The court decided against the company on the single ground that it had been a monopoly unlawful under the laws of Illinois.—*Held*, that the case should be remanded for a new trial.—*Peoria Gas Co. v. Peoria*, 200 U. S. 48, 26 Sup. Ct. R. (U. S.) 214.

Where a state railroad commission has dealt with a corporation operating lines of railroad under leases from other corporations, as an existing transportation company, by serving upon it a schedule of rates, etc., it cannot, in a suit by such corporation to restrain the enforcement of such orders, object that the corporation is an unlawful combination.—*Southern Pac. Co. v. Board of R. R. Comrs.*, 78 Fed. 236.

[16] — Parties and procedure.

Joinder of parties resulting in making an action a suit against a state,—see post, note [22].

In an action by a railroad to restrain the enforcement of rates fixed under legislative authority, the better practice is for the court to refer the testimony to some competent master, to make all needed computations and fully find the facts.—*Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. R. (U. S.) 336, revg. s. c. 90 Fed. 363.

A suit to restrain the enforcement of an order of a state railroad commission was brought against the commission, the attorney-general and the attorney for the commission. The attorney-general had no peculiar relations to the commission and provision was made by the act creating the commission for a special attorney for that body.—*Held*, that the attorney-general was not a proper party.—*Central of Ga. R. Co. v. McLendon*, 157 Fed. 961.

A state railroad commission, the several members thereof, the special attorney to the commission and the secretary of the commission are proper parties in a suit to restrain the putting into effect of an order of the commission as to rates.—*Central of Ga. R. Co. v. McLendon*, 157 Fed. 961.

There is at least a *prima facie* presumption that a state railroad commission acted in good faith in fixing a rate, and that the rate is not confiscatory. The court may decline to hold that the sworn declarations of a bill for injunction and the supporting affidavits outweigh the *prima facie* presumption that the action of the commission is valid.—*Central of Ga. R. Co. v. McLendon*, 155 Fed. 974.

Where it is sought to restrain two legislative acts and an order of the state railroad and warehouse commission regulating rates, the commission has such charge in respect to the enforcement of these rates that it can properly be made a defendant, as well as the attorney-general.—*Perkins v. No. Pac. R. Co.*, 155 Fed. 445.

A suit to enjoin the enforcement of railroad rates prescribed by a state commission is of such general importance and so far dependent on the particular facts which may be developed by the proofs, that it will not be disposed of on demurrer unless the bill is clearly insufficient.—*Houston & T. C. R. Co. v. Storey*, 149 Fed. 499.

For a detailed statement of the contents of a bill on which a federal injunction was granted by Judge McKenna restraining the enforcement of an order of the California Railroad Commission fixing certain rates. See *Southern Pac. Co. v. Board of E. R. Comrs.*, 78 Fed. 236.

Where a state commission has made up schedules of rates, and the carrier complains only as to one rate or several, but does not attack the schedules in entirety, the court will not grant relief.—*Pensacola & A. R. Co. v. State*, 25 Fla. 310, 5 So. 833, 3 L. R. A. 661n.

Upon judicial review of the proceedings of a state railroad commission, no strictness of pleading is required, and both the complaint filed with the commission and the petition for review must be liberally construed for the purpose of obtaining a disposition of the matters involved, upon their substantial merits.—*Chicago, I. & L. R. Co. v. Hunt*, — Ind. App. —, 79 N. E. 927.

[17] — Rule where reasonable doubt exists.

Where there is nothing satisfactory in the record, from which a reasonable deduction can be made as to the cost of transportation, the amount of the commodity transported, or the effect the rates fixed by a state commission will have upon the income of the carrier, the state court is right in refusing to disturb the rates so fixed.—*Atlantic C. L. R. Co. v. Florida*, 203 U. S. 256, 27 Sup. Ct. R. (U. S.) 108, affg. s. c. 48 Fla. 146, 37 So. 657.

A bill for temporary injunction restraining the Iowa Board of Railroad Commissioners from putting into effect a schedule of rates, on the ground that they would be ruinous to the road, was refused. Where the effect of the rates is doubtful, with a probability that they will prove compensatory,

and the amount of business to be affected thereby is comparatively small, the courts may well wait for the test of experience.—*Chicago B. & Q. R. Co. v. Dey*, 38 Fed. 656.

Speculative suggestions as to what might happen, in the absence of affirmative showing that the carrier faces such a problem, as shown by actual test, will not warrant a court in overthrowing the findings of a state commission.—*State v. Seaboard Air L. R. Co.*, 48 Fla. 150, 37 So. 658.

Where the railroad and the commission differ as to the reasonableness of rates fixed by the latter, and there is room for a difference of intelligent opinion on the subject, the court must not by enjoining the enforcement of such rates, substitute its judgment for that of the commission, but must leave the rates to the test of experiment.—*Storrs v. Pensacola & A. R. Co.*, 29 Fla. 617, 11 So. 226.

If a commission thinks a schedule it has fixed would, as a rule, be remunerative to the carrier, but the latter thinks not, and the court finds there is room for a difference of intelligent opinion on the question, the court should not interfere, substituting its judgment for that of the specially qualified commissioners, but should leave the schedule to the test of experiment.—*Pensacola & A. R. Co. v. State*, 25 Fla. 310. 5 So. 833, 3 L. R. A. 661n.

[18] — Form and scope of injunction orders.

Where grounds for enjoining the enforcement of an act of a state legislature regulating railroad rates exist, the restraining order may enjoin executive and quasi-judicial officials from taking any steps calculated to enforce or apply the legislative act complained of.—*Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. R. (U. S.) 441.

If the injunction restraining enforcement of an order of a state commission is broader than the necessities of the case require, it will be modified accordingly.—*McNeill v. So. R. Co.*, 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722.

An injunction temporarily restraining officers charged with the duty of enforcing rates fixed by statute for gas, pending a determination of the constitutionality of such rates, will not be enlarged to restrain the actions of individual consumers who are not parties to the suit.—*Consolidated Gas Co. v. Mayer*, 146 Fed. 150.

The court cannot enjoin against all possible breaches of the law, or put the conduct of the defendant's entire business in jeopardy of contempt. Words like "or by any other device or method" should be stricken from the injunction.—*U. S. v. A. T. & S. F. R. Co.*, 142 Fed. 176; *Swift v. U. S.*, 375, 25 Sup. Ct. R. (U. S.) 276.

The court enjoined the Nebraska commission from enforcing a schedule of maximum rates, on the ground that it would not yield the carrier a reasonable compensation.—*Held*, that this did not enjoin the commission from inquiring into and fixing a reasonable rate for specific articles, and it was not necessary for the commission to apply to the court for permission to do so.—*Higginson v. Chicago, B. & Q. R. Co.*, 100 Fed. 235.

L. 1896, ch. 125, fixed the maximum price of gas furnished in the city of New York at 80 cents. The Consolidated Gas Company obtained, in a suit in the Circuit Court of the United States, in which the attorney-general of the state, the district attorney of New York County, The City of New York and the Gas and Electricity Commission of the state were made parties defendant, an injunction *pendente lite*, which restrained the defendants from enforcing the provisions of the statute, provided that the gas company might make the same charges as formerly and further provided that the difference between the old and new rate be paid into court, there to remain until final adjudication of the cause.—*Held*, that a consumer, not made a party to the suit in the federal court, was not, by this injunction, enjoined from bringing a suit in the Supreme Court of New York State to restrain the gas company from cutting off his supply of gas on account of his refusal to pay the old rates, nor was the Supreme Court prohibited from entertaining such a suit.—*Richman v. Consolidated Gas. Co.*, 186 N. Y. 209, 78 N. E. 871, affg. s. c. 114 App. Div. (N. Y.) 216, 100 N. Y. Supp. 81.

Where the state has empowered the city council to fix the maximum prices of gas, the council has fixed such a maximum and a federal court has enjoined the company from obeying and the city from enforcing such ordinance, the state may nevertheless assert the validity of the ordinance and sue to enforce it.—*State ex re' Atty.-Gen. v. Cincinnati Gas L. & C. Co.*, 18 Oh. St. 262.

An order of court requiring the making of certain connections by railroads should have provided that the railroads might, after the court's change of schedule went into effect, agree upon a new schedule not in violation of law, and that either road, in the absence of such new schedule, might, after reasonable notice to the other and to the attorney for the commonwealth, apply to the court or judge in vacation for such modification in the order as it might show to be proper.—*Southern R. Co. v. Commonwealth*, 98 Va. 758, 37 S. E. 294.

[19] — Relief from changed conditions.

The affirmance by the courts of a rate fixed by commission is simply an affirmance of the reasonableness of the rate at the time of the determination, and if at any time thereafter facts should arise which would make such rate confiscatory, the courts are always open to relief from the restriction of the rate.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Sup. 341, revd. on other grounds, 191 N. Y. 123, 83 N. E. 693.

[20] Federal interference with orders of state commissions — In general.

Where the defendant carrier, in the course of a proceeding in a state court, contended that consistently with the Interstate Commerce Act, the state had no jurisdiction to grant the relief in question, and such contention was essentially decided adversely to the defendant, a federal question exists, and federal courts may review the judgment granting such relief.—*Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. R. (U. S.) 350, revg. s. c. 12 Tex. Ct. R. 498, 85 S. W. 1052.

A federal court has jurisdiction to grant restraining orders protecting the right of a railroad to carry on interstate commerce in a state without becoming subject to orders of a state commission which so directly burden such commerce as to amount to a regulation thereof.—*McNeill v. So. R. Co.*, 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722.

Rates for the transportation of persons and property within the limits of a state are primarily for its determination, but the question whether they are so unreasonably low as to deprive the carrier of his property without just compensation, cannot be so conclusively determined by the legislature of the state or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.—*Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. R. (U. S.) 418, affg. s. c. 64 Fed. 165.

Federal courts will restrain state officers from enforcing a unconstitutional state statute whose enforcement would violate rights guaranteed by the U. S. Constitution, doing irreparable damage to the petitioner.—*Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. R. (U. S.) 262.

The federal courts may enjoin any interference with or obstruction of interstate commerce.—*In re Debs*, 158 U. S. 564, 15 Sup. Ct. R. (U. S.) 900.

The North Carolina Corporation Commission is declared by statute to be a court of record.—*Held*, that it is nevertheless, in the exercise of many of its functions merely an agent of the state, and may be enjoined by a federal court as to acts not judicial in character.—*Southern R. Co. v. Greensboro I. & C. Co.*, 134 Fed. 82.

Jurisdiction of federal courts in a suit to restrain compliance with a Vermont statute unreasonably reducing fares, see *Ball v. Rutland R. Co.*, 93 Fed. 513.

[21] — Attempts to prevent resort to federal courts.

A state statute providing that if a foreign corporation removes to a federal court cases commenced against it in a state court, its license to do business within the state shall thereupon be revoked, is not unconstitutional.—*Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, 26 Sup. Ct. R. (U. S.) 619.

A state cannot tie up a citizen of another state, having property rights within its territory invaded by the unauthorized act of its own officers, to suits for redress in its own courts. He may invoke the federal court.—*Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. R. (U. S.) 1047; *Chicot v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. R. (U. S.) 695; *Lincoln v. Luning*, 133 U. S. 529, 10 Sup. Ct. R. (U. S.) 363; *Cowles v. Mercer Co.*, 7 Wall. (U. S.) 118.

When a state gives a foreign corporation power to do business within the state, it does not grant a mere license which can be revoked at the pleasure of the state, and a statute providing that in a suit against such a corporation, if it should remove the cause to any federal court, it would forfeit its right to do business within the state, is unconstitutional as violating the obligation of contract.—*Chicago, R. I. & P. R. Co. v. Ludwig*, 156 Fed. 152.

A statute of Alabama fixed 2½ cents per mile as the maximum rate for the transportation of intra-state passengers, and provided for maximum freight rates. Another statute provided that the bringing of a suit by a foreign corporation in a federal court "shall *ipso facto* forfeit all its right or license to engage or carry on business, originating or terminating within this state."—*Held*, that the provision relative to expulsion was unconstitutional.—*Seaboard Air L. R. Co. v. R. R. Commission*, 155 Fed. 792.

[22] — Suits against a state.

A manufacturer of syrups brought suit to restrain the dairy and food commissioner of a state from doing acts intended to affect the standing and injure the sale of his products, which, such manufacturer alleged, were unlawful acts done by the commissioner under cover of his office.—*Held*, that this was not a suit against a state.—*Scully v. Bird*, 209 U. S. 481, 28 Sup. Ct. R. (U. S.) 597.

A suit to restrain an unlawful order of a state railroad commission is not a suit against a state.—*Mississippi R. R. Commission v. Ill. Cent. R. Co.*, 203 U. S. 335, 27 Sup. Ct. R. (U. S.) 90; *McNeill v. So. R. Co.*, 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722, affg. s. c. 134 Fed. 82; *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. R. (U. S.) 1047; *Seaboard Air L. R. Co. v. R. R. Commission*, 155 Fed. 792; *Perkins v. No. Pac. R. Co.*, 155 Fed. 445; *Southern R. Co. v. McNeill*, 155 Fed. 156.

A suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of the U. S. Const., 11th Amendment.—*Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. R. (U. S.) 398.

An Act of Alabama prescribed maximum rates of toll to be charged on a bridge, which was operated by a railroad corporation, and prescribed

a penalty for charging or demanding any sum in excess of the statutory rate. The receivers of this railroad brought a suit to enjoin the attorney general of the state and the solicitor of the Eleventh Judicial Circuit of the state from in any way enforcing this act, attacking its constitutionality.—*Held*, that this was a suit against a state within the prohibition of the U. S. Const., 11th Amendment, it appearing that neither of the officers sought to be enjoined were officers who held any special relation to the particular act sought to be adjudged unconstitutional and that they were not specially charged with the execution of the enactment.—*Fitz v. McGhee*, 172 U. S. 516, 19 Sup. Ct. R. (U. S.) 269.

A bill to restrain administrative officers from proceeding under a statute alleged to be unconstitutional, is not a suit against a state.—*Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. R. (U. S.) 262.

Whether a state is a party defendant, within the meaning of the U. S. Const., Eleventh Amendment, must be determined by a consideration of the nature of the case as presented on the whole record, and it is not conclusive of the question that the state is not actually named as a party defendant.—*In re Ayres*, 123 U. S. 443, 8 Sup. Ct. R. (U. S.) 164.

A state regulative act provided that proceedings to recover penalties for violations of the act or orders of the railroad commission should be brought in the name of the state by direction of the governor. Suit was brought to restrain the enforcement of an order of the commission and it was sought to make the governor of the state a party defendant.—*Held*, that he was not a proper party defendant, as in such a case the suit would become a suit against the state, the governor not being a mere ministerial officer as to the enforcement of this statute.—*Central of Ga. R. Co. v. McLendon*, 157 Fed. 961.

An action to restrain the railroad commission and attorney-general of a state from enforcing a state regulative act alleged to be unconstitutional is not a suit against a state within the meaning of the eleventh amendment to the Federal Constitution.—*Louisville & N. R. Co. v. R. R. Commission*, 157 Fed. 944.

A suit by a railroad corporation to restrain the attorney-general of a state and other state officers from enforcing a law fixing maximum rates to be charged, on the ground that the same will deprive the railroad corporation of property without due process of law, is not a suit against the state within the meaning of U. S. Const., 11th Amendment, forbidding suits against a state.—*Perkins v. No. Pac. R. Co.*, 155 Fed. 445, see, also, *Ex Parte Young*, 209 U. S. 123, 28 Sup. Ct. R. (U. S.) 441.

A suit by a foreign telegraph company to restrain a prosecuting attorney from instituting proceedings against the said company to recover penalties for the failure of the company to comply with certain statutes providing the conditions upon which a foreign corporation might do

business within the state, is a suit against the state within the meaning of the U. S. Const., 11th Amendment.—*Western Union Tel. Co. v. Andrews*, 154 Fed. 95.

A suit in equity by a gas corporation to restrain the Massachusetts Gas Commission and the attorney general of the state from enforcing a rate fixed by said Commission is not a suit against a state, prohibited by the U. S. Const., 11th Amendment.—*Haverhill Gaslight Co. v. Barker*, 109 Fed. 694.

[23] — Proceedings in state courts.

Because a state railroad commission has to go into court to enforce its orders, the proceedings before the commission preliminary to the making of such an order are not proceedings in a state court, so that they cannot be enjoined by a federal court. — *Mississippi R. R. Commission v. Ill. Cent. R. Co.*, 203 U. S. 335, 27 Sup. Ct. R. (U. S.) 90.

Federal courts may not restrain proceedings in state courts.—*Oman v. Bedford-Bowling Green Stone Co.*, 134 Fed. 64, citing notes to *Garner v. Second Nat. Bank*, 16 C. C. A. (U. S.) 90; *Central Trust Co. v. Grantham*, 27 C. C. A. (U. S.) 575; *Copeland v. Bruning*, 63 C. C. A. (U. S.) 437.

A suit to restrain the enforcement by a state railroad commission, of an unreasonable schedule of rates, under an act prescribing heavy fines and alternative imprisonment for charges in excess of the rates fixed by such commission, is not a suit to restrain a criminal proceeding.—*Southern Pac. Co. v. Board of R. R. Comrs.*, 78 Fed. 236.

A bill to enjoin enforcement of an order of a state railroad commission is not a suit to restrain cases already pending in a state court.—*Texas & P. R. Co. v. Kuteman*, 54 Fed. 547.

[24] — Diverse citizenship.

Proceedings before a state railroad commission may be enjoined by a federal court on grounds of diverse citizenship.—*Mississippi R. R. Commission v. Ill. Cent. R. Co.*, 203 U. S. 335, 27 Sup. Ct. R. (U. S.) 90. Distinguishing, *Field v. Barber Asphalt Co.*, 194 U. S. 618, 24 Sup. Ct. R. (U. S.) 784.

A citizen of another state who feels himself aggrieved and damaged by rates prescribed by a state railroad commission may ask the Circuit Court of the United States to restrain their enforcement. Such court may grant such an injunction, if it finds such rates are unreasonable or unjust, but it is not within its power to establish rates itself, or to restrain the commission from again establishing rates which it deems lawful.—*Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. R. (U. S.) 1047.

[25] — Federal question raised.

In order to entitle a party to the review of a state judgment on the ground that a federal question was involved, such question must have been specifically raised and necessarily decided adversely, in the decision of the cause.—*Louisville & N. R. Co. v. Smith*, 204 U. S. 551, 27 Sup. Ct. R. (U. S.) 401.

Where the defendant, in the course of a proceeding in a state court, contended that the subject-matter was not within state jurisdiction, consistently with the Interstate Commerce Act, and such contention was essentially decided adversely to the defendant, a "federal question" exists, and the federal court may review the judgment on a writ of error.—*Texas & P. R. Co., v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. R. (U. S.) 350, revg. s. c. 12 Tex. Ct. R. 498, 85 S. W. 1052.

In order to give a federal court jurisdiction to review a judgment of a state court, it must appear that a federal question was raised and adversely decided in the state tribunal—*Murdock v. Memphis*, 20 Wall. (U. S.) 590, affg. s. c. Cold. (Tenn.) 483.

[26] — Amount in controversy.

Amount in controversy in action to enforce penalty,—see post, § 59, notes.

The "matter in controversy," under the statute as to the removal to a federal court of suits to restrain orders of a state commission, is not the rates or charges as to which the order was issued, but the amount of the penalties which might be imposed for non-compliance with the order.—*McNeill v. So. R. Co.*, 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722.

[27] — What the U. S. Supreme Court will review.

See also, ante, note [2].

If a state court decided a case as to railroad rates on the hypothesis conceded by counsel for both sides that the rate was pursuant to a lawful schedule duly filed, published, etc., it is not open to either party to contend on a review of the case by a federal court that the rate was not so filed and published and so was not a legal rate.—*Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. R. (U. S.) 350, revg. s. c. 12 Tex. Ct. R. 498, 85 S. W. 1052.

If will be presumed that a state railroad commission, in fixing a rate, acts with a full knowledge of the situation, and where the record does not disclose all the evidence, the Supreme Court of the United States will not hold confiscatory and unlawful a rate sustained by the

highest court of the state, where it appears by the report of the company that the rate exceeds the average rate received by the company during the previous year.—*Seaboard Air L. R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, affg. s. c. 48 Fla. 129, 37 So. 314, 48 Fla. 150, 37 So. 658.

If the record does not disclose why an order of a state railroad commission was made applicable only to certain local and intrastate rates, but the state law provides that the rates so fixed are to be considered in all courts just and reasonable, and the effect of the order was to equalize rates, the Supreme Court of the United States will not hold the judgment of the highest court of the state sustaining the law erroneous.—*Seaboard Air L. R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, affg. s. c. 48 Fla. 129, 37 So. 314, 48 Fla. 150, 37 So. 658.

[28] — When federal court may enforce order of state commission.

Where an express company began an action in a federal court to enjoin the enforcement of an order of a state railroad commission, and the state board thereupon filed a cross-bill praying the enforcement of such order, the federal court, on finding that the order was valid, might properly decree its enforcement, although the state law provided that if a carrier refused to comply with the lawful orders of the commission, the commissioners should apply to the state courts for the enforcement of such orders.—*Platt v. Le Cocq*, 150 Fed. 391.

ARTICLE II.

Provisions Relating to Railroads, Street Railroads and Common Carriers.

SECTION 25. Application of article.

26. Adequate service; just and reasonable charges.
27. Switch and side-track connections; powers of commissions.
28. Tariff schedules; publication.
29. Changes in schedule; notice required.
30. Concurrence in joint tariffs; contracts, agreements or arrangements between any carriers.
31. Unjust discrimination.
32. Unreasonable preference.
33. Transportation prohibited until publication of schedules; rates as fixed to be charged; passes prohibited.
34. False billing, etc., by carrier or shipper.
35. Discrimination prohibited; connecting lines.
36. Long and short haul.
37. Distribution of cars.
38. Liability for damage to property in transit.
39. Continuous carriage.
40. Liability for loss or damage* by violation of this act.

§ 25. Application of article.—The provision of this article shall apply to the transportation of passengers, freight or property, from one point to another within the state of New York, and to any common carrier performing such service.

For application of provisions of Interstate Commerce Act,—see Interst. Com. Act, § 1, post, Appendix B.

Constitutional provisions as to railroads and street railroads,—see N. Y. Const., Art. III., § 18, as amd. in 1901.

Application of the provisions of Railroad Law relative to the former Board of Railroad Commissioners,—see N. Y. R. R. L., § 171.

Territorial jurisdiction of each Commission within the state,—see ante, § 5.

Jurisdiction of each Commission as to gas and electrical corporations,—see post, § 65.

Nothing in this act is deemed to apply to or operate upon interstate or foreign commerce,—see post, § 86.

* Headnote of section as enacted (post, § 40) has the word “caused” after the word “damage.”

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

What constitutes a railroad or street railroad,—see ante, § 2, note [8].

Consideration of interstate and foreign business in determining as to reasonableness of intrastate rates,—see post, § 49, note [41].

[1] Powers of Interstate Commerce Commission.

The Interstate Commerce Commission possesses no common law jurisdiction or powers.—*Jones v. St. L. & S. R. Co.*, 12 Inters. Com. R. 167.

[2] What constitutes state or interstate commerce—In general.

When interstate transportation begins,—see post, note [8].

When interstate transportation ends,—see post, note [9].

Commerce among the several states comprehends every species of commercial intercourse between the different states.—*Adair v. U. S.*, 208 U. S. 161, 28 Sup. Ct. R. (U. S.) 277.

“Commerce,” in the interstate commerce clause of the United States Constitution, includes intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph.—*The Lottery Cases*, 188 U. S. 321, 23 Sup. Ct. R. (U. S.) 321.

The railroad commissioners of Arkansas sought to regulate rates for the transportation of goods on a through bill of lading from Fort Smith, Ark., to Grannis, Kan., by way of Spiro in the Indian Territory, a total distance of 116 miles, of which 52 miles is in Arkansas and 64 in Indian Territory.—*Held*, that this is interstate commerce and no part of it is within regulative power of the state.—*Hanley v. K. C. S. R. Co.*, 187 U. S. 617, 23 Sup. Ct. R. (U. S.) 214.

The transportation of live stock from one state to another is interstate commerce.—*Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. R. (U. S.) 92.

The Kentucky legislature attempted to fix charges and tolls on a bridge between Kentucky and Ohio.—*Held*, that the traffic across the river was interstate commerce and that the bridge was an instrumentality of such commerce.—*Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. R. (U. S.) 1087.

An empty car was consigned from Omaha, Neb., to Council Bluffs, Iowa, for the purpose of being repaired.—*Held*, that the car was engaged in interstate commerce.—*U. S. v. Chicago & N. W. R. Co.*, 157 Fed. 616.

Importation into one state from another is the indispensable element of interstate commerce.—*U. S. v. Colorado & N. W. R. Co.*, 157 Fed. 321; *Baird v. St. L. I. M. & S. R. Co.*, 41 Fed. 592.

The test whether an act of transportation is interstate commerce is whether the commodity is en route interstate, not whether the road carrying it is wholly within one state.—*U. S. v. Standard Oil Co.*, 155 Fed. 305.

When merchandise is carried from one state into another, no system or scheme can be devised to make it intrastate traffic.—*U. S. v. Ch. M. & St. P. R. Co.*, 149 Fed. 486.

Transportation wholly within one state is the purely internal commerce of that state. If the transportation be a part of a voyage from one state to another, or to a foreign country, it is interstate commerce.—*Augusta S. R. Co. v. Wrightsville & T. R. Co.*, 74 Fed. 522; *Mattingly v. Pa. Co.*, 3 I. C. C. R. 609.

Oranges were shipped by growers to their forwarding agent at another point in same state, for reshipment to another state. The agent immediately forwarded them to their destination in another state.—*Held*, that the shipment to the forwarder was interstate commerce and hence not under the regulation of the Florida railway commission.—*Cutting v. Florida, R. & N. Co.*, 46 Fed. 641.

The Interstate Commerce Act applies to shipments from the United States into a foreign country.—*In re Investigation of Grand Trunk R. Co.*, 2 Inters. Com. R. 496, 3 I. C. C. R. 89.

A shipment originating in New Jersey, destined for New York, but delivered to the consignees in Jersey City, is not subject to the Interstate Commerce Act.—*N. J. Fruit Exch. v. Central R. Co. of N. J.*, 2 Inters. Com. R. 18, 84, 2 I. C. C. R. 142.

An interstate railroad owned coal mines and engaged in the mining of coal. It sold coal so mined, at the mouth of the mine, and then transported it interstate.—*Held*, that this was a violation of the Hepburn Act of June 29, 1906. If the coal so mined was not transported across state boundaries, the Hepburn Act would not be thereby violated.—*Central Trust Co. v. Pittsburg, S. & N. R. Co.*, 52 Misc. (N. Y.) 195, 101 N. Y. Supp. 837.

A carrier accepted goods consigned to a point in another state, but contracted with the consignor that its responsibility should cease when it had taken the goods to another point within the state where the shipment began and there turned them over to a connecting carrier.—*Held*, that this shipment and contract were not interstate commerce, and might be regulated by the state.—*Heiserman v. Burl. C. & N. R. Co.*, 63 Iowa, 732, 18 N. W. 903.

Shipment held not to be interstate shipment.—*Gulf, C. & S. F. R. Co. v. State*, 97 Tex. 274, 78 S. W. 495, affg. s. c. 32 Tex. Civ. App. 1, 73 S. W. 429.

A shipment consigned out of the state is interstate commerce, even though the liability of the initial carrier ends within the state.—*Houston Nav. Co. v. Ins. Co.*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713.

To constitute interstate commerce, it is not necessary that all the carriers engaged in an interstate or foreign shipment shall be parties to the contract of shipment for the entire route.—*Houston Nav. Co. v. Ins. Co.*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713.

Transportation is domestic, local, intra-state, only when confined to the boundaries of the state in which the contract of shipment is made. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643n.

A shipment beginning out of the state, and continued between two points within the state by a connecting carrier, is not subject to state regulation as to the latter or any part of such transportation.—*State v. So. Kan. R. Co.*, — Tex. Civ. App. —, 49 S. W. 252.

[3] — Shipments between points within a state, passing through another state in transit.

A state tax against a domestic railroad corporation, because of transportation done by it from one point within the state to another point within it, but passing through part of another state en route, is not a tax upon interstate commerce.—*Lehigh V. R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. R. (U. S.) 806; distinguished and apparently narrowed in *Hanley v. K. C. S. R. Co.*, 187 U. S. 617, 23 Sup. Ct. R. (U. S.) 214.

A shipment from New York City to Buffalo, via New Jersey and Pennsylvania, is interstate commerce.—*U. S. v. D. L. & W. R. Co.*, 152 Fed. 269.

Transportation by railroad from one point within a state to another point within it, but passing without the state during the transportation and through a part of another state, is not an interstate shipment and does not constitute interstate commerce.—*U. S. ex rel. Kellogg v. Lehigh V. R. Co.*, 115 Fed. 373.

Transporting milk from upstate New York through New Jersey to New York City is interstate commerce.—*Milk Prod. P. Assn. v. D. L. & W. R. Co.*, 7 Inters. Com. R. 92.

Transportation between two points in New York State, passing en route through Pennsylvania, is not interstate commerce.—*Dillon v. Erie R. Co.*, 19 Misc. (N. Y.) 116, 43 N. Y. Supp. 320.

A railroad commission cannot fix rates for transportation between two points in the same state, if the route traverses a neighboring state.

— *State v. Ch. St. P. M. & O. R. Co.*, 40 Minn. 267, 41 N. W. 1047, 3 L. R. A. 238.

That in the course of continuous transportation from one point to another in the same state, goods pass through a portion of another state, does not make their shipment interstate commerce nor remove such shipment from the domain of state regulation.— *Seawell v. K. C. Ft. S. & M. R. Co.*, 119 Mo. 222, 24 S. W. 1002.

The fact that freight being shipped between two points in the same state passes in transit through another state, does not make it interstate commerce or take it out of the regulative power of the state.— *Commonwealth v. Lehigh V. R. Co.*, 129 Pa. 308, 18 Atl. 125.

A state cannot regulate transportation between two points in the same state, where it is by connecting roads, one of which lies wholly in another state.— *Sternberger v. Cape Fear & Y. V. R. Co.*, 29 S. C. 510, 7 S. E. 836, 2 L. R. A. 105.

[4] — Switching of cars.

The switching of cars by a carrier is a local service which has no reference to the interstate shipment, even though the goods are intended for that. The charge for such switching is not a part of the through rate.— *Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. 849.

Hay was shipped to East St. Louis as its final destination, and then sold to complainant.— *Held*, that when he purchased and took possession of it, the contract of transportation under which it started was at an end. The mere fact that he intended to send it on to some interstate point could hardly make the service of switching that car-load to its warehouse an act of interstate transportation.— *St. L. Hay & G. Co. v. C. B. & Q. R. Co.*, 11 Inters. Com. R. 82.

The switching of cars, empty or loaded with freight ultimately to be consigned interstate, is purely local and under state regulation, until after such cars have been billed to their destination.— *Larrabee Flour Mills v. Mo. Pac. R. Co.*, 74 Kan. 808, 88 Pac. 72.

[5] — Elevating, weighing and discharging grain.

The elevation and storing of grain is not interstate commerce.— *Brass v. Stoesser*, 153 U. S. 391, 14 Sup. Ct. R. (U. S.) 857, affg. s. c. 2 N. Dak. 482.

Elevating, receiving, weighing, and discharging grain is not interstate commerce, but the regulation thereof is within the police power of the state.— *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. R. (U. S.) 468, affg. s. c. *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682.

The elevation and storing of grain by an elevator company is not interstate commerce.— *Munn v. Illinois*, 94 U. S. 113, affg. s. c. 69 Ill. 80.

The state legislature may, in exercise of its police power, fix the maximum charge for elevating, receiving, weighing and discharging grain by warehouses and elevators.—*Matter of Annon*, 50 Hun (N. Y.), 413, 2 N. Y. Supp. 275.

A state has no power to regulate the allowance by the railroads to terminal elevators of certain charges on shipments of grain from points in Nebraska to points outside, for the services of such elevators are incident to interstate commerce.—*State v. Omaha Elev. Co.*, — Neb. —, 110 N. W. 874.

[6] — Other accessorial services.

A cab service maintained by the Pennsylvania Railroad to and from its Jersey City terminals to points in New York, the charges for which are separate from its charges for train transportation, is not interstate commerce.—*Pennsylvania R. Co. v. Knight*, 192 U. S. 21, 24 Sup. Ct. R. (U. S.) 202.

Moving goods coming from another state, to the freight warehouse, from the platform on which they are put on arrival, is a part of the interstate transportation.—*Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. R. (U. S.) 664, revg. s. c. 90 Iowa, 496, 58 N. W. 887.

Wharfage is not interstate commerce, but local in its nature.—*Transportation Co. v. Parkersburg*, 107 U. S. 691, 2 Sup. Ct. R. (U. S.) 732.

Where a stock yard is located partly in one state and partly in another, the passing of stock to and fro over the state line, in the yards, for convenience in feeding and handling, does not impress the traffic with the character of interstate commerce.—*Cotting v. Kansas City Stock Yards Co.*, 82 Fed. 839; revd. on other points, 183 U. S. 79, 22 Sup. Ct. R. (U. S.) 30.

Icing and refrigeration of cars for interstate transportation is a part of the transportation service, not merely incident to it or local in its character. Hence it is under the jurisdiction of the Interstate Commerce Commission.—*Matter of Charges for Transportation of Fruit*, 11 Inters. Com. R. 129.

[7] What railroads are engaged in interstate commerce.

A railroad lying wholly within the limits of one state entered into an agreement to receive goods under through bills of lading and to participate in through rates for such goods.—*Held*, that by this arrangement it became a continuous line for interstate shipment and thus amenable to the control of the Interstate Commerce Commission as to such through transportation, originating or taking place over its lines.—*Cincinnati, N. O. & T. P. R. Co. v. Interst. Com. Commission*, 162 U. S. 184, 16 Sup. Ct. R. (U. S.) 700.

A railroad company which is located wholly within a state but carries interstate shipments for an express company operating over its lines is engaged in interstate commerce.—*U. S. v. Colorado & N. W. R. Co.*, 157 Fed. 342.

A railroad wholly within one state is engaged in interstate commerce as to an interstate shipment which it handles as a connecting carrier.—*U. S. v. Colorado & N. W. R. Co.*, 157 Fed. 342; *U. S. v. Colorado & N. W. R. Co.*, 157 Fed. 321; *U. S. v. Standard Oil Co.*, 155 Fed. 305.

Where a belt line railroad operating within and around a city and wholly within a state, receives shipments of interstate freight consigned to or from local shippers on through bills of lading, it is, as to such shipments, subject to the provisions of the Interstate Commerce Act as to discrimination, even though the duty to furnish switch service to all shippers grows out of a local ordinance and a state statute.—*Interstate Stock-yards Co. v. Indianapolis U. R. Co.*, 99 Fed. 472.

The interstate shipment of freight over several connecting lines, under a through rate, etc., makes a road subject to the Interstate Commerce Act, even though its line lies wholly within one state and its part of the joint charge is its regular local rate.—*U. S. ex rel. Interst. Com. Commission v. Seaboard R. Co.*, 82 Fed. 563.

A railroad lying wholly within a state, which transports freight, whether coming from within or without the state, solely on local bills of lading, without any arrangements with connecting carriers, is not engaged in interstate commerce.—*U. S. v. Ch. K. & S. R. Co.*, 81 Fed. 783.

A railroad lying wholly within a state, which transports freight, whether coming from within or without the state, solely on local bills of lading, under a special contract limited to its own line, and without dividing charges with any other carriers or assuming any other obligations to or for them, is not amenable to the Interstate Commerce Commission.—*U. S. v. Ch. K. & S. R. Co.*, 81 Fed. 783.

A railroad company whose line is wholly within one state, and which, although it accepts freight for transportation interstate, never issues bills of lading to points beyond its own line, receives no freight on through bills of lading and has no arrangements with other roads for a division of charges or for a common control or management, is not under the jurisdiction of the Interstate Commerce Commission.—*Interst. Com. Com. v. Bellaire, Z. & C. R. Co.*, 77 Fed. 942.

A railway wholly within the bounds of a single state, when it voluntarily engages as a common carrier in interstate commerce by making an arrangement for a continuous carriage or shipment of goods, is subject, so far as such traffic is concerned, to the Interstate Commerce Act.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

A short road wholly within one state, which has never owned any rolling stock, but is used by companies conducting an interstate traffic in coal, is subject to the Interstate Commerce Act.—*Heck v. E. Tenn. V. & G. R. Co.*, 1 Inters. Com. R. 498, 775, 1 I. C. C. R. 495.

[8] When the interstate transportation begins.

A dining car regularly employed in interstate traffic does not cease to be so when in the yards, pending the next trip of its train.—*Johnson v. So. Pac. Co.*, 196 U. S. 1, 25 Sup. Ct. R. (U. S.) 158.

When a commodity has been delivered to a common carrier, to be transported on a continuous voyage or trip to a point beyond the limits of the state where delivered, the character of interstate or foreign commerce attaches thereto.—*Coe v. Erroll*, 116 U. S. 517, 6 Sup. Ct. R. (U. S.) 475, affg. s. c. 62 N. H. 303; *The Daniel Ball*, 10 Wall. (U. S.) 557; *Ex parte Koehler*, 30 Fed. 867; *In re Greene*, 52 Fed. 113; *Houston Nav. Co. v. Ins. Co.*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713; *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643n.

Goods intended for interstate transportation are not subjects of interstate commerce until actually started in course of transportation. The carrying of them to, and depositing them at, a depot, is no part of such transportation.—*Coe v. Erroll*, 116 U. S. 517, 6 Sup. Ct. R. (U. S.) 475, affg. s. c. 62 N. H. 303.

When interstate commerce begins is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state.—*U. S. v. Boyer*, 85 Fed. 425; *In re Greene*, 52 Fed. 104.

It is a serious question whether, when property has been put in a car with the intent of shipping it outside the state, it has not already commenced its interstate journey, so that regulation of switching charges for it is an interference with interstate commerce.—*Chicago, St. P. M. & O. R. Co. v. Becker*, 35 Fed. 883.

A car being hauled from one of the carrier's yards to another, preparatory to going upon the main line bound for its destination in another state, is engaged in interstate commerce.—*U. S. v. P. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 696.

[9] When interstate transportation ends.

Where oil shipped interstate in tanks is stopped at a point for the purpose of separation, distribution and reshipment to fill small orders, there is a termination of the interstate shipment.—*General Oil Co. v. Crain*, 209 U. S. 211, 28 Sup. Ct. R. (U. S.) 475.

An interstate shipment, on reaching the destination specified in the original contract of shipment, so far loses its character as an interstate

shipment that its further transportation to another point in the same state, upon the directions of the consignee, is controlled by the laws of the state and not by the Interstate Commerce Act.—*Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. R. (U. S.) 360, affg. s. c. 97 Tex. 274, 78 S. W. 495.

Unless Congress has provided the contrary, goods moving in interstate commerce in the original package cease to be such commerce only after delivery and sale so long as they remain in such original package.—*Heyman v. So. R. Co.*, 203 U. S. 270, 27 Sup. Ct. R. (U. S.) 104.

Where coal, transported from another state, has not been delivered to the consignee, but remains on the tracks of the railroad in the condition in which it was originally brought from the other state, the interstate transportation has not yet been completed.—*McNeill v. So. R. Co.*, 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722.

Cattle shipped for sale to stockyards in the same state as the point of shipment, with the expectation that they will end their transit, after sale, in another state, and actually doing so, with only the interruption necessary to find a purchaser at the stockyards, are subjects of interstate commerce from the time of shipment.—*Swift v. U. S.*, 196 U. S. 375, 25 Sup. Ct. R. (U. S.) 276.

Coal stored in a car in which it originally started on its interstate transit, is still under exclusive federal regulation.—*Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. R. (U. S.) 132.

An article of interstate commerce remains wholly free from state regulation as long as it is in the original package.—*Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. R. (U. S.) 132; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. R. (U. S.) 757, revg. s. c. 170 Pa. 284, 33 Atl. 85, 30 L. R. A. 396; *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. R. (U. S.) 664, revg. s. c. 90 Iowa, 496, 58 N. W. 887, 24 L. R. A. 245; *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. R. (U. S.) 265; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. R. (U. S.) 367, affg. s. c. 103 Mo. 241, 15 S. W. 81, 11 L. R. A. 219; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. R. (U. S.) 681, revg. s. c. 78 Iowa, 286, 43 N. W. 188; *Southern R. Co. v. Greensboro I. & C. Co.*, 134 Fed. 82; affd. 202 U. S. 543, 28 Sup. Ct. R. (U. S.) 722; *McGwigan v. R. Co.*, 95 N. C. 428.

Carloads of coal shipped interstate remain subjects of interstate commerce until delivered to the consignee.—*Southern R. Co. v. Greensboro I. & C. Co.*, 134 Fed. 82; affd. 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722.

Cattle shipped from points without a state, consigned to stockyards within the state, are the subjects of interstate commerce and so remain until they reach their destination and are sold and mingled with the mass of state property.—*Cotting v. Kansas City Stock Yards Co.*, 82 Fed. 839; revd. on other points, 183 U. S. 79, 22 Sup. Ct. R. (U. S.) 30.

A shipper billed goods from a point without a state to a point within said state, and then, without opening the car, reshipped to another point within said state consigned to himself. When the first shipment was made, the last point was the intended final point of destination.—*Held*, that the transportation was an interstate shipment so that the railroad could not be compelled to carry between the last two mentioned points at a rate fixed under state legislation.—*Porter v. St. L. S. W. R.*, 78 Ark. 182, 95 S. W. 453.

Where coal was brought from Pennsylvania and stored in New Jersey, to be sold and delivered as contracts for that purpose were consummated, no definite point of trans-shipment being known, and the purchaser being unknown, such coal was not deemed to be coal in interstate commerce.—*Lehigh & W. Coal Co. v. Borough of Junction*, — N. J. L. —, 66 Atl. 923.

[10] Extent of state and federal regulative power.

What acts constitute a regulation of interstate commerce,—see post, notes [13]–[17].

State and federal statute dealing with same subject,—see post, note [19].

General power to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

General scope of police power of the state,—see ante, § 1, note [2].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

State or federal control over switching charges,—see post, § 27, note [14].

Power of state to compel transfer of interstate shipments to connecting lines,—see post, § 35, note [10].

Power of state to regulate limitation of liability,—see post, § 38, note [12].

Extent of state and federal power over bills of lading,—see post, § 38, note [13].

A law passed within the acknowledged power of a state is not unconstitutional because it may indirectly affect interstate commerce.—*Asbell v. Kansas*, 209 U. S. 251, 28 Sup. Ct. R. (U. S.) 485, affg. s. c. 60 Kan. 51.

Congress has power to regulate the relation of master and servant to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce.—*The Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. R. (U. S.) 141.

A state, in the exercise of its police authority, may confer on an administrative agency the power to make reasonable regulations as to the place, manner and time of delivery of merchandise moving in the chan-

nels of interstate commerce, but any such regulation which directly burdens interstate commerce is not within the power of the state.—*McNeill v. So. R. Co.*, 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722.

Although a railroad is largely engaged in interstate commerce, it is subject to state regulation as to any of its service performed wholly within a state and not as a part of interstate commerce.—*Pennsylvania R. Co. v. Knight*, 192 U. S. 21, 24 Sup. Ct. R. (U. S.) 202.

An inspection law affecting interstate commerce is not for that reason invalid unless it is in conflict with an act of Congress or is an attempt to regulate interstate commerce.—*Patapsco Guano Co. v. N. C. Board*, 171 U. S. 345, 18 Sup. Ct. R. (U. S.) 862, affg. 52 Fed. 609; *McLean v. Denver & R. G. R. Co.*, 203 U. S. 38, 27 Sup. Ct. R. (U. S.) 1.

A carrier exercising his calling in a particular state, though engaged in interstate commerce, is answerable according to the laws of the state, for acts of non-feasance and mis-feasance committed within its limits.—*Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. R. (U. S.) 289, affg. s. c. 95 Iowa, 260, 63 N. W. 692.

The power of Congress over interstate commerce includes the prevention of any interference or obstruction of interstate commerce.—*In re Debs*, 158 U. S. 564, 15 Sup. Ct. R. (U. S.) 900.

A Texas statute made it unlawful for a railroad to collect a greater sum than is specified in the bill of lading. Interst. Com. Act, § 6, forbids the charging of more or less than is specified in the published schedules.—*Held*, that the federal statute controls as to interstate shipments.—*Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. R. (U. S.) 802.

That a railway is incorporated under a federal statute and charter, and derives therefrom the power to charge and collect tolls and rates for transportation, does not remove it from the operation of the act of the Texas legislature creating a railroad commission, as to business wholly within the state.—*Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 14 Sup. Ct. R. (U. S.) 1060.

The authority of a state is limited to fixing charges on such channels of commerce as are exclusively within its territory.—*Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. R. (U. S.) 1087.

A railroad corporation of one state, by leasing a railroad in another state, subjects itself to such local legislation in the latter state as would have been applicable to the corporation owning the road, if no lease had been made.—*Stone v. Ill. Cent. R. Co.*, 116 U. S. 347, 6 Sup. Ct. R. (U. S.) 348, 388, 1791.

Nothing can be done by a state which will operate as a burden on the interstate business of a carrier, or impair the usefulness of its facilities for interstate traffic.—*Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 6 Sup. Ct. R. (U. S.) 334, 338, 1191.

A state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter or unless what is done amounts to a regulation of foreign or interstate commerce.—*Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 6 Sup. Ct. R. (U. S.) 334, 388, 1191.

For the purpose of promoting a consolidation between a railroad organized under the laws of Wisconsin and one organized under the laws of Illinois, the legislature of Wisconsin passed an act providing that the consolidated company should remain subject to the laws of Wisconsin and Illinois, respectively, and should have the same privileges as though the consolidation had not taken place; provided that the laws of Illinois should have no effect in Wisconsin.—*Held*, that the new company was subject to legislative control in Wisconsin in the same manner as the original Wisconsin corporation, and the fact that an act regulating the fares and freights in Wisconsin so far as they are of domestic concern may incidentally affect interstate commerce does not make the act invalid, in the absence of any regulation by Congress.—*Peik v. Ch. & N. W. R. Co.*, 94 U. S. 164.

All commercial action within the limits of a state, and which does not extend to any other state or foreign country, is exclusively under state regulation.—*The Passenger Cases*, 7 How. (U. S.) 283, revg. s. c. 4 Denio (N. Y.), 475, 4 Metc. (Mass.) 283.

The completely internal commerce of a state may be considered as reserved to the regulation of the state itself.—*Gibbons v. Ogden*, 9 Wheaton (U. S.), 1, revg. 17 Johns. (N. Y.) 488.

Congress has the unlimited power to regulate interstate commerce, and if that power cannot be effectually exercised without affecting interstate commerce, then Congress may undoubtedly in that sense regulate interstate commerce so far as necessary to fully and effectually regulate the interstate traffic.—*U. S. v. Colorado & N. W. R. Co.*, 157 Fed. 321.

In prescribing the terms on which a foreign corporation, engaged in both interstate and intrastate commerce, may do business within a state, the latter may make regulations or may impose conditions and restrictions which amount to a regulation of the intrastate commerce to be carried on by such corporation, but not of its interstate commerce.—*Butler Bros. Co. v. U. S. Rubber Co.*, 156 Fed. 1.

Any prohibition, obstruction or burden on interstate commerce by a state by any method is unconstitutional. Interstate commerce may not, directly or indirectly, be regulated by a state.—*Butler Bros. Co. v. U. S. Rubber Co.*, 156 Fed. 1.

Congress may take the regulation of safety appliances and employers' liability, as to common carriers, entirely out of the scope of state regu-

lation, even as to carriers and employees engaged in both state and interstate traffic.—*Kelly v. Gt. Northern R. Co.*, 152 Fed. 211.

That the employees engaged in interstate traffic also handle intrastate traffic, does not destroy the power of Congress to enact employers' liability and safety appliance laws for their protection.—*Snead v. Central of Ga. R. Co.*, 151 Fed. 608.

Until an article shipped interstate ceases to be interstate commerce, Congress having assumed to regulate such commerce, no state regulations can apply.—*Southern R. Co. v. Greensboro I. & C. Co.*, 134 Fed. 82; *affd.* 202 U. S. 543; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. R. (U. S.) 802; *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.*, 86 Fed. 407; *Interst. Com. Commission v. C. B. & Q. R. Co.*, 186 U. S. 320, 22 Sup. Ct. R. (U. S.) 824.

The application of local freight rates as instrumentalities of warfare between railroads as to interstate or foreign through freights, unless such rates are actually reasonable for the services rendered, is clearly within the ban of the national law, even though the railroad lies wholly within one state.—*Augusta S. R. Co. v. Wrightsville & T. R. Co.*, 74 Fed. 522.

Any regulation of an interstate shipment by a state law is invalid.—*Baird v. St. L. I. M. & S. R. Co.*, 41 Fed. 592.

A state cannot regulate rates, etc., on that part of a continuous interstate shipment which lies wholly within that state.—*Louisville & N. R. Co. v. R. R. Commission of Tenn.*, 19 Fed. 679.

A state cannot make a regulation of interstate commerce by exercising its power over corporations of its own creation, if it permits them to engage in interstate commerce. Possibly it may bind the corporations permitted to engage in interstate commerce to schedules of rates agreed upon by them; but this is binding only by force of the contract of the carrier to be so bound, and not as a regulation of the rates under any municipal power of the states over commerce. A regulation of interstate commerce, as such, is as invalid in a charter as in any state statute.—*Louisville & N. R. Co. v. R. R. Commission of Tenn.*, 19 Fed. 679.

A state cannot regulate the transportation of merchandise from a place in one state to a place in another.—*Kaeiser v. Ill. Cent. R. Co.*, 18 Fed. 151.

A state board cannot regulate transportation by an ocean route between two points in the same state.—*Pacific Coast Ss. Co. v. Board of R. R. Comrs.*, 18 Fed. 10.

The California Board of Railroad Commissioners has no power to regulate or interfere with the transportation of persons or merchandise by a steamship company between ports within the state, if they are in

transit to or from other states, or if the transportation consists of voyages upon the ocean, bringing the steamships under the control of Congress.—*Pacific Coast Ss. Co. v. Board of R. R. Comrs.*, 9 Sawyer (U. S.), 253.

The power of the federal government to regulate interstate commerce cannot be narrowed or encroached upon by state authority, either directly or indirectly. State action will always be treated with the highest deference and respect, but cannot be allowed to control in matters within the federal jurisdiction. That one or more states have adopted a particular regulation as to carload lots, etc., is not a reason for applying it to interstate traffic if it does not seem just and politic.—*Leonard v. Ch. & A. R. Co.*, 2 Inters. Com. R. 416, 491, 599, 3 I. C. C. R. 241.

Although it is the general rule that a contract for the transportation of goods from one state to another is governed by the law of the place where it is made, such rule can have no application where the subject matter of the contract is one of national cognizance and Congress has assumed exclusive control of it by enacting a law for its complete regulation.—*Southern R. Co. v. Harrison*, 119 Ala. 539, 23 So. 552, 43 L. R. A. 385.

A state may regulate discrimination in rates on shipments beginning within that state, even though such shipments are into other states.—*People v. Wabash, St. L. & P. R. Co.*, 104 Ill. 476; affd. 105 Ill. 236.

A railroad built under the authority of a state, whether an interstate carrier or not, must, so long as Congress does not interfere, submit to reasonable local regulations in the use of its property.—*Pittsburg, C. C. & St. L. R. Co. v. Hartford City*, — Ind. —, 82 N. E. 787.

That a railroad is engaged in interstate commerce, does not put it beyond state regulation as to all business done therein not directly connected with commerce between the states.—*McGuire v. C. B. & Q. R. Co.*, 131 Iowa, 340, 108 N. W. 902.

Regulation in respect to the transfer of freight or passengers in their transit from one state to another upon railroads, or in respect to railroads engaged in the transportation of interstate commerce, is a regulation of interstate commerce and the power to make such regulations is vested in Congress.—*Council Bluffs v. K. C. St. J. & B. R. Co.*, 45 Iowa, 338.

Regulation of ferry rates between New York and New Jersey is not within the power of either state.—*New York C. & H. R. R. Co. v. Board of Freeholders*, 74 N. J. L. 367, 65 Atl. 860.

If the installing of a connecting switch to facilitate the transfer of cars from one road to another at an intersection point, would facilitate both interstate and intrastate traffic, either the federal or state commission may order such switch.—*Jacobson v. Wisconsin, M. & P. R. Co.*, 71 Minn. 519, 74 N. W. 893.

That the tracks of a carrier extend into another state and that it does interstate business, does not relieve it from state regulation as to shipments beginning and ending within the state.—*Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643.

A state can make no law regulating the rate for carriage of goods between that state and another state, although the regulation be construed as applying only to so much of the line of transit as lies within its own borders.—*Gulf, C. & S. F. R. Co. v. Dwyer*, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478.

The sole power to prescribe the rules by which interstate commerce shall be governed is vested in Congress.—*Barnhard Bros. v. Morrison*, 13 Tex. Ct. R. 168, 87 S. W. 376.

[11] Effect of failure of Congress to exercise its regulative powers.

The transportation of live stock from one state to another is interstate commerce, and when the entire subject of such transportation is taken under direct national supervision, all local or state regulations in respect of such matters and covering the same ground will cease to have any force, whether formerly abrogated or not. The power which the states might thus exercise in the absence of congressional action is in this way suspended until national control is abandoned, if ever, and the subject thereby returned to the power of the states.—*Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. R. (U. S.) 92.

In the absence of congressional legislation on the subject the states may regulate the consolidation of interstate railway corporations.—*Boardman v. L. S. & M. S. R. Co.*, 84 N. Y. 157.

Until Congress has passed laws on a given subject, under the powers conferred by the commerce clause, the state may pass regulative legislation.—*Phelps v. Racey*, 60 N. Y. 10, affg. s. c. 5 Daly (N. Y.), 235.

A statute which incidentally affects interstate commerce is valid, unless it is clearly shown that Congress has legislated on the same subject.—*American Exp. Co. v. So. Ind. Exp. Co.*, 167 Ind. 292, 78 N. E. 1021.

All interstate and foreign traffic is under the exclusive control of Congress, and even if Congress has not seen fit to prescribe any specific rules to govern interstate commerce, that does not affect the question.—*Hardy v. A. T. & S. F. R. Co.*, 32 Kan. 698, 5 Pac. 6.

The jurisdiction of Congress to regulate interstate commerce is not conferred upon the states merely by a failure of Congress to act as to such matters.—*Railroad Comrs. v. R. Co.*, 22 S. C. 220.

The commercial power of Congress is exclusive of the state authority only when the subjects upon which it is exerted are national in their

character and admit and require uniformity of regulations applying alike in all states, and when the subjects within that power are local in their nature and operation, or constitute mere aids to commerce, the states may provide for their regulation until Congress intervenes and supersedes their action.—*St. Louis S. W. R. Co. v. Ark. & T. Grain Co.*, 15 Tex. Ct. R. 372, 95 S. W. 656.

[12] Extent of police power of states.

Review of acts done pursuant to police power,—see ante, § 23, note [8].

While a state may, in the exercise of its police authority, confer upon an administrative agency the power to make many reasonable regulations concerning the places, manner and time of delivery of merchandise moving in the channels of interstate commerce, any regulation of such subject made by the state or under its authority, which directly burdens interstate commerce, is a regulation of interstate commerce and repugnant to the U. S. Constitution.—*McNeil v. So. R. Co.*, 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722.

A state may make all needful regulations of a police character for the government of railroad companies while operating their roads within the state.—*Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 6 Sup. Ct. R. (U. S.) 334, 388, 1191.

Where a state police regulation has for its main purpose the promotion of the welfare of its citizens, it is not invalid although it may incidentally affect interstate commerce.—*Logan v. Postal T. & C. Co.*, 157 Fed. 570.

A fencing act is a police regulation to which railroads are subjected by the sovereignty of the state.—*Ohio & M. R. Co. v. Russell*, 115 Ill. 52, 3 N. E. 561.

In the exercise of police powers, a state may enact laws which, though they affect commerce between states, are not to be considered regulations of that commerce within the meaning of the U. S. Constitution.—*Gulf, C. & S. F. R. Co. v. Dwyer*, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478.

**[13] What acts constitute a regulation of interstate commerce
—In general.**

General extent of state and federal control,—see ante, note [10].

Rules of construction,—see post, note [18].

State statutes not to be construed as applying to interstate commerce,—see post, note [18.]

A state act, providing that it shall be unlawful for any person, not authorized by the act, to sell or transfer the whole or any part of a ticket or other evidence of the holder's right to travel, is not a regulation of interstate commerce.—*Fry v. State*, 63 Ind. 552.

Every regulation which is an impediment to celerity in the transportation of passengers or freight imposes a burden on commerce, and every such regulation of interstate commerce is void, if undertaken by a state.—*Council Bluffs v. K. C. St. J. & B. R. Co.*, 45 Iowa, 338.

Every obstacle to transportation and every burden laid upon it by legislative authority is "regulation."—*Railroad Comrs. v. R. Co.*, 22 S. C. 220.

[14] — Statutes relating to rates and charges.

Long and short haul statute as a regulation of interstate commerce,—
see post, § 36, note [9].

While a state regulation forbidding discrimination in rates within the state may affect commerce generally, such a result is too remote to be regarded as an interference with interstate commerce.—*Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, 22 Sup. Ct. R. (U. S.) 95.

Mileage book statutes applying only to transportation wholly within the state, are not regulations of interstate commerce but are a valid exercise of the regulative power of the state.—*Purdy v. Erie R. Co.*, 162 N. Y. 42, 56 N. E. 503, 48 L. R. A. 669, affg. s. c. 33 App. Div. (N. Y.) 643, 54 N. Y. Supp. 1114.

An Indiana act permitting shippers to recover excessive charges on shipments beginning within the state but going interstate, is valid, and not a regulation of interstate commerce.—*Chicago, St. L. & P. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451.

It is not sufficient objection to a state statute compelling the issuance of mileage books, that it may incidentally affect commerce between the states, if it does not attempt to regulate such commerce.—*Attorney-General v. Old Colony R. Co.*, 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112.

A statute of Maryland providing that the defendant road should not after a certain date permit its tracks to connect with those of the B. & O. R. Co., unless the latter road should, before that date, so arrange its freight charges upon coal delivered to it from the defendant road for shipment over its lines that the combined charges of the two roads should not exceed the lowest total freight charges upon coal shipped to the same destination over the line of the B. & O., or roads leased or operated by it from any point in Pennsylvania or West Virginia which was as far distant from such destination as the point at which such coal is delivered to the defendant, is invalid as a state regulation of interstate commerce.—*State v. Cumberland & P. R. Co.*, —Md. —, 66 Atl. 458.

An act fixing a maximum rate of 2½ cents per mile for passenger transportation is not unconstitutional as regulating interstate com-

merce, if it applies only to trips wholly within the state.—*Commissioner of Railroads v. Wabash R. Co.*, 123 Mich. 669, 82 N. W. 526; affd. 126 Mich. 113, 85 N. W. 466.

A state statute which provides that any carrier which charges "any greater toll or compensation for the transportation, receipt, handling," etc., "of goods or merchandise in violation of the provisions of this act," shall forfeit a certain sum, is void in so far as it attempts to fix rates on interstate shipments.—*Jennings v. Big Sandy & C. R. Co.*, — W. Va. —, 57 S. E. 272.

[15] — Statutes and orders relating to service, facilities and accommodations.

Compelling erection of tracks to facilitate transfer of cars, freight and passengers between connecting carriers not a regulation of interstate commerce,—see post, § 35, note [10].

Whether statute requiring furnishing of cars is a regulation of interstate commerce,—see post, § 37, note [14].

Any command of a state, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order the stopping of an interstate train at a given station, is void if it directly regulates interstate commerce.—*Atlantic C. L. R. Co. v. Wharton*, 207 U. S. 328, 28 Sup. Ct. R. (U. S.) 121, revg. s. c. 74 S. C. 80, 54 S. E. 224.

When an order made under state authority, requiring the stopping of an interstate train at a named point, is assailed as an attempted state regulation of interstate commerce, the question whether such order is void as a direct regulation of such commerce may be tested by considering the nature of the order, the character of the interstate train to which it applies, its necessary and direct effect upon the operation of such train and the adequacy of the local facilities existing at the station where the interstate train has been commanded to stop.—*Atlantic C. L. R. Co. v. Wharton*, 207 U. S. 328, 28 Sup. Ct. R. (U. S.) 121, revg. s. c. 74 S. C. 80, 54 S. E. 224.

If a railroad is furnishing a locality with proper facilities, an order of a state commission that it stop more trains there, including interstate trains, is an unlawful interference with interstate commerce, but not otherwise.—*Mississippi R. Commission v. Ill. Cent. R. Co.*, 203 U. S. 335, 27 Sup. Ct. R. (U. S.) 90.

An order of the North Carolina Corporation Commission requiring a railroad to deliver cars from another state to the consignee on a private siding beyond its own right of way is a burden on interstate commerce, and hence void.—*McNeill v. So. R. Co.*, 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722.

A state statute requiring the furnishing of cars upon application, having been construed by the courts of that state to apply to applications for cars for shipments out of the state, is an attempt to regulate interstate commerce and is beyond the police power of the state.—*Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 26 Sup. Ct. R. (U. S.) 491.

The separate coach law of Kentucky, being operative only within the state, and having been construed by its supreme court as applicable only to intrastate commerce, is not an infringement upon the exclusive power of Congress to regulate interstate commerce.—*Chesapeake & O. R. Co. v. Kentucky*, 179 U. S. 388, 21 Sup. Ct. R. (U. S.) 101.

A statute requiring a through train from St. Louis to New York to stop at an Illinois country seat which has already adequate facilities from the defendant railroad, is an attempt to regulate interstate commerce. The distinction between it and a statute as to speed, safety and signal devices, stoppage at drawbridges and similar provisions contributing to the safety, comfort and convenience of patrons, is obvious.—*Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. R. (U. S.) 722, revg. s. c. 175 Ill. 359, 51 N. E. 842; *Illinois Cent. R. Co. v. Illinois*, 163 U. S. 142, 16 Sup. Ct. R. (U. S.) 1096, revg. s. c. 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119.

An Ohio statute requiring all trains, including interstate trains, to stop at places of more than 3,000 inhabitants, is within the powers of the state, and is not a regulation of interstate commerce.—*Lake Shore & M. S. R. Co., v. Ohio*, 173 U. S. 285, 19 Sup. Ct. R. (U. S.) 465, affg. s. c. 8 Ohio Circ. Ct. 220.

A state statute requiring every railroad to stop at all county seats all its regular passenger trains running wholly within the state, is not a regulation or unconstitutional interference with interstate commerce, as applied to a train connecting with an interstate train.—*Gladson v. Minnesota*, 166 U. S. 430, 17 Sup. Ct. R. (U. S.) 627, affg. s. c. 57 Minn. 385, 59 N. W. 487.

A Mississippi statute, requiring all passenger railroads aside from street railroads to provide equal but separate accommodations for the white and colored races, having been construed by the supreme court of the state to apply solely to commerce within the state, is not in violation of the commerce clause of the U. S. Constitution.—*Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. R. (U. S.) 348, affg. s. c. 66 Miss. 662, 5 L. R. A. 132.

The Supreme Court of Louisiana having decided that a state law requires all carriers of passengers to make no distinctions as to race, color, etc., and that this applies to interstate traffic while within the state, such law is unconstitutional in so far as it relates to transportation be-

tween the states, for it is a regulation of interstate commerce, within the exclusive jurisdiction of Congress.—*Hall v. De Cuir*, 95 U. S. 485, revg. s. c. 27 La. Ann. 1.

A state may enact that all carriers of coal therein shall provide track connections with all mines within its borders, even though such connections are to be used for interstate as well as state traffic.—*Red Rock F. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 438.

An act of Tennessee providing that all railroads within the state shall provide separate equal accommodations for white and colored persons, to which conductors must assign passengers, is, in its application to a passenger journeying from one state to another upon an interstate railroad line, an invasion of the power of Congress to regulate interstate commerce.—*Carrey v. Spencer*, 36 N. Y. Supp. 886.

A state act requiring separate coaches for white and colored passengers is void as to interstate trains, but otherwise valid.—*Hart v. State*, 100 Md. 596, 60 Atl. 457.

Laws of a state providing for equal separate accommodations to white and colored persons are a valid exercise of state authority although they affect and impose burdens upon interstate commerce.—*Smith v. State*, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432.

A Texas statute providing that any carrier subject to the act shall be liable for unjust discrimination, does not apply to discriminations as to the delivery of freight shipped from another state.—*Fielder v. Mo. K. & T. R. Co.*, 92 Tex. 176, 46 S. W. 633.

A state statute imposing a penalty upon a carrier for failure to furnish cars within six days after written demand therefor by a shipper, is void as a regulation of interstate commerce.—*Texas & P. R. Co. v. Allen*, 17 Texas Ct. R. 256, 98 S. W. 450.

A state statute providing for penalties for the failure of a railroad corporation to furnish cars on demand, is valid as to intrastate commerce although invalid as to interstate commerce.—*Allen v. Tex. & P. R. Co.*, — Tex. —, 101 S. W. 792.

A state cannot regulate discrimination between individuals as to terminal facilities and necessary switching of cars and delivery at terminal points, with respect to freight brought from another state.—*Fielder v. Missouri, K. & T. R. Co.*, — Tex. Civ. App. —, 42 S. W. 362.

[16] — Statutes relative to conduct of business.

The Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, chap. 647) prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business. This act is broader in application than the prohibition of restraints of trade at common law. If the purpose of a combination is to prevent any inter-

state transportation of an article, the fact that the means operated at one end before physical transportation began and at the other after the physical transportation had ended is immaterial. The Act cannot be held inapplicable because the defendants were not themselves engaged in interstate commerce.—*Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. R. (U. S.) 301.

Any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real and substantial relation to or connection with the commerce regulated. There is not such a relationship between the membership of an employee of a railroad company in a labor organization and the carrying on of interstate commerce as will enable Congress, in the regulation of interstate commerce, to make it a criminal offense for a railroad company engaging in interstate commerce or any officer or agent of the same to unjustly discriminate against any employee on account of his membership in a labor organization.—*Adair v. U. S.*, 208 U. S. 161, 28 Sup. Ct. R. (U. S.) 277.

The rules prescribed for the construction of railways, and for their management and operation, designed to protect persons and property, are strictly within the scope of the local law.—*Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. R. (U. S.) 289.

The Georgia legislature forbid running of freight trains on Sunday, and defendant was indicted under that statute.—*Held*, that although the law to a limited extent affects interstate commerce, it is not a regulation of interstate commerce, nor an invasion of federal jurisdiction, but a police regulation sustained by the Constitution, and will be upheld in the absence of Congressional legislation. Nothing in the act shows it was intended as a regulation of interstate commerce.—*Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. R. (U. S.) 1086, affg. s. c. 90 Ga. 396, 7 S. E. 1009.

A state statute which requires from the agent of every express company not incorporated under the laws of that state, a license before he can carry on any business for the said company within that state, and also requires a statement to be filed in the auditor's office showing that the company is possessed of an actual capital of \$150,000, exclusive of stock notes, is void as a regulation of interstate commerce.—*Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. R. (U. S.) 851.

A state statute requiring engineers to be examined as to color signals, etc., is within the power of the state, even as to interstate trains.—*Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. R. (U. S.) 28, affg. s. c. 83 Ala. 71, 3 So. 702.

An Alabama act requiring the examination and licensing of all railway engineers is not a regulation of interstate commerce.—*Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. R. (U. S.) 564.

Regulation of employers' liability on interstate railroads is not a regulation of interstate commerce.—*Kelley v. Gt. Northern R. Co.*, 152 Fed. 211.

An act regulating the liability of interstate carriers to their employees is not within the regulative power of Congress, not being a regulation of interstate commerce.—*U. S. v. Scott*, 148 Fed. 431; distinguished, 152 Fed. 763; *Brooks v. So. Pac. R. Co.*, 148 Fed. 986; *Howard v. Ill. Cent. R. Co.*, 148 Fed. 997; *Order of R. R. Telegraphers v. L. & N. R. Co.*, 148 Fed. 437.

A state is without power to compel a carrier to transfer cars of live stock to a connecting road at a point of intersection within the state, where the shipment was received in another state, and is therefore a subject of interstate commerce.—*Central Stock Yards Co. v. L. & N. R. Co.*, 118 Fed. 113, 63 L. R. A. 2113; affd. 192 U. S. 568, 24 Sup. Ct. R. 339.

A state statute compelling railroads to heat passenger cars by apparatus other than stoves is a valid exercise of police power and applies to railroads engaged in interstate commerce, not being a regulation of interstate commerce.—*People v. N. Y. N. H. & H. R. Co.*, 55 Hun (N. Y.), 409, 8 N. Y. Supp. 672; affd. without opinion, 123 N. Y. 635, 25 N. E. 953.

A state can not by a "Sunday law" restrict the transportation of merchandise on Sunday, when it is consigned from beyond the state on one side to be delivered beyond the state on the other side.—*Dinsmore v. N. Y. Board of Police*, 12 Abb. N. C. (N. Y.) 436.

A state statute may properly restrict the transportation on Sunday of goods which are consigned from one point to another within the state.—*Dinsmore v. N. Y. Board of Police*, 12 Abb. N. C. (N. Y.) 436.

A statute forbidding the transportation of cotton by night is a constitutional exercise of the police power, not a regulation of interstate commerce.—*Davis v. State*, 68 Ala. 58.

A state statute forbidding the running of freight and excursion trains on Sunday, except in certain cases, is not invalid as a regulation of interstate commerce.—*Seale v. State*, 126 Ga. 644, 55 S. E. 472.

Compelling the stopping of freight trains, including those engaged in interstate traffic, on Sunday, is within the regulative police power of the state.—*Hennington v. State*, 90 Ga. 396, 17 S. E. 1009; affd. 163 U. S. 299; 16 Sup. Ct. R. (U. S.) 1086; *State v. R. Co.*, 24 W. Va. 783.

Requiring interstate carriers to file certain reports with a state commission is not a regulation of interstate commerce, and is within the power of the state, even though Congress has made similar requirements of such carriers.—*People v. Ch. I. & L. R. Co.*, 223 Ill. 581, 79 N. E. 144.

A city ordinance requiring railroads to maintain electric lights at street crossings, although it may in some way affect interstate commerce, is a valid exercise of the police power of the state.—*Pittsburg, C. C. & St. L. R. Co. v. Hartford City*, — Ind. —, 82 N. E. 787.

An act of a state legislature, regarding the bills of lading and special contracts for shipments, is void in so far as it relates to interstate transportation.—*Carton v. Ill. Cent. R. Co.*, 59 Iowa, 148, 13 N. W. 67.

For the courts to compel a carrier to deliver live stock to the consignee at the point of destination, according to the custom obtaining among railroads and in obedience to the demand of the consignor, whether the freight comes from a point within or without the state, is not a regulation of interstate commerce.—*Louisville & N. R. Co. v. Central Stockyards Co.*, 30 Ky. L. R. 18, 97 S. W. 778.

A state statute imposing a penalty on carriers for failing to ship freight within five days is operative and valid as to interstate commerce.—*Bagg v. Wilmington C. & A. R. Co.*, 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596.

A state act providing a penalty in case of failure by a carrier to pay claims for loss or damage to freight within a given time is not unlawful as an interference with interstate commerce.—*Charles v. Atlantic C. L. R. Co.*, — S. C. —, 58 S. E. 927.

A state statute compelling a connecting carrier, upon application, to trace freight shipped over its line under a contract for shipment over the lines of two or more carriers, is not invalid as a regulation of interstate commerce.—*Skipper v. Seaboard Air L. R. Co.*, 75 S. C. 276, 55 S. E. 454.

A state statute prohibiting common carriers from limiting their common-law liability, applies to interstate shipments beginning within the state, not being a regulation of interstate commerce.—*Pitman v. Pac. Exp. Co.*, 24 Tex. Civ. App. 595, 59 S. W. 949.

[17] — Statutes imposing tax.

A railroad which was wholly within a state but which carried on interstate business in conjunction with other roads was taxed upon the gross earnings of its system.—*Held*, that this was a regulation of interstate commerce.—*Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. R. (U. S.) 638.

The taxation, under the N. Y. Franchise Tax Law, of cars belonging to a New York corporation is not unconstitutional because the cars are at times temporarily absent from the state.—*People ex rel. N. Y. C. & H. R. R. Co. v. Miller*, 202 U. S. 584, 26 Sup. Ct. R. (U. S.) 714.

A Pennsylvania statute imposing a tax upon the tolls received by the N. Y. L. E. & W. R. Co., from other railroad companies, for the use

by them respectively of so much of its lines as lie in Pennsylvania, is not in conflict with the interstate commerce clause of the U. S. Constitution, when applied to goods so transported from without the state.—*New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 15 Sup. Ct. R. (U. S.) 896, affg. s. c. 145 Pa. 38, 22 Atl. 212.

An act of the Tennessee legislature imposing a privilege tax on sleeping cars not owned by the road using them, is void as to interstate transportation.—*Pickard v. Pullman S. C. Co.*, 117 U. S. 34, 6 Sup. Ct. R. (U. S.) 635, affg. s. c. 22 Fed. 276.

A stamp tax on bills of lading of goods going out of the state is void.—*Almy v. California*, 24 How. (U. S.) 169.

[18] Rules of construction.

Strict construction of penal statutes,—see ante, § 1, note [36].

Penal statutes to be construed in favor of party of whom penalty is claimed,—see ante, § 1, note [37].

Divisibility of state statute void as to interstate transportation,—see ante, § 1, note [40].

Where a state statute provides for the state regulation of carriers as to both intrastate and interstate shipments, and the shipment in question is intrastate and therefore clearly within the scope of the state's regulative power, it is unnecessary for a federal court to consider the validity of the statute when applied to a shipment from without the state.—*Seaboard Air L. Co. v. Seegers*, 207 U. S. 73, 28 Sup. Ct. R. (U. S.) 28, affg. s. c. 73 S. C. 71, 52 S. E. 797.

An act conferring administrative powers will not be construed as delegating powers over commerce over which the enacting legislature had no control.—*Illinois Cent. R. Co. v. McKendree*, 203 U. S. 514, 27 Sup. Ct. R. (U. S.) 153.

General statutes of a state will not be construed as having been intended to apply to interstate transportation, if they bear no evidences on their face of having been so intended and their subject matter is not under exclusive federal jurisdiction.—*Gulf, C. & S. A. R. Co. v. Miami Ss. Co.*, 86 Fed. 407.

An act in general terms will not be construed to apply to carriage on lines outside the state, when so to do would be to make it unconstitutional.—*Beardsley v. N. Y. L. E. & W. R. Co.*, 15 App. Div. (N. Y.) 251, 44 N. Y. Supp. 175; revd. on other grounds, 162 N. Y. 230, 56 N. E. 488.

Penal statutes are strictly local, and when enacted by a state will not be construed to apply to happenings outside the state.—*Beach v. Bay State Ss. Co.*, 30 Barb. (N. Y.) 433, 18 How. Pr. (N. Y.) 335, 10 Abb. Pr. (N. Y.) 71, revg. s. c. 27 Barb. (N. Y.) 248, 16 How. Pr. (N. Y.) 1, 6 Abb. Pr. (N. Y.) 415.

A statute of Illinois relating to charges of reasonable rates will not be construed as relating to interstate commerce.—*Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141.

A state statute in general terms forbidding discriminations in rates will not be construed to apply to interstate shipments, for that would be to construe it to be void.—*McGwigan v. Wilmington & W. R. Co.*, 95 N. C. 428.

[19] State and federal statutes operating on same subject.

Where a state and federal statute operate on the same subject, and prescribe different rules as to it, and the federal statute is one within the competency of Congress, the state statute must give way.—*Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. R. (U. S.) 802.

[20] Matters left by Interstate Commerce Commission to state regulation.

The Interstate Commerce Commission may, in its discretion, decline to interfere with rates, mainly local in their bearings, where it is clear that the railroad commission of the state has ample authority in law and perfect control over the situation.—*Hastings M. Co. v. Ch. M. & St. P. R. Co.*, 11 Inters. Com. R. 675.

Where one of two rates under consideration before the Interstate Commission is wholly within a state whose railroad commission has power to deal with it, and it appears that a readjustment of the rate would compel the carriers to make also an equitable readjustment of the interstate rate complained of, the federal commission will leave the matter to the action of the state authorities.—*Dallas Bureau v. Tex. & P. R. Co.*, 8 Inters. Com. R. 33.

[21] Status of foreign corporations doing business within a state.

A foreign railroad corporation is not doing business in a state, within the meaning of a statute as to service of process, simply because it owns practically the entire capital stock of another railroad which does business therein.—*Peterson v. Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 27 Sup. Ct. R. (U. S.) 513.

A corporation of one state, owning property and doing business in another state by permission of the latter, does not thereby become a citizen of that state also.—*Pennsylvania R. Co. v. St. L. A. & T. H. R. Co.*, 118 U. S. 290, 9 Sup. Ct. R. (U. S.) 1094.

A state statute forbidding discrimination by railroads applies to all railroads operating within that state, whether organized under its laws or the laws of other states.—*People v. Wabash, St. L. & P. R. Co.*, 104 Ill. 476; *affd.* on other points, 105 Ill. 236.

§ 26. Safe and adequate service; just and reasonable charges; *[excessive charges prohibited].— Every corporation, person or common carrier performing a service designated in the preceding section, shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such corporation, person or common carrier for the transportation of passengers, freight or property or for any service rendered or to be rendered in connection therewith, as defined in section two of this act, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction and made as authorized by this act. Every unjust or unreasonable charge made or demanded for any such service or transportation of passengers, freight or property or in connection therewith or in excess of that allowed by law or by order of the commission is prohibited.

Borough presidents to have control over the laying of surface railroad tracks in streets,—see Greater N. Y. Ch., § 383.

For parallel sections of Interstate Commerce Act,—see Inters. Com. Act, § 1.

Weight of rail to be used in railroad construction,—see N. Y. R. R. L., § 31.

Duty of railroads as to fences, farm crossings and cattle guards,—see N. Y. R. R. L., § 32.

Provisions requiring railroads to place signboards, station flagmen and erect gates at highway crossings,—see N. Y. R. R. L., § 33.

Provisions as to notice of time of starting of trains,—see N. Y. R. R. L., § 34.

Provisions as to stopping locomotives at points of intersection of railroads,—see N. Y. R. R. L., § 36.

Power of legislature to alter or reduce fare,—see N. Y. R. R. L., § 38.

Penalties for exaction of excessive fare,—see N. Y. R. R. L., § 39.

For requirements under the New York Rapid Transit Act,—see N. Y. Rap. Tr. Act, § 24, subd. 4, §§ 28, 34d, post, Appendix A.

Transportation of passengers, property or freight defined,—see ante, § 2, subd. 1.

Manner of filing and publishing schedules of rates,—see post, §§ 28, 29. •

The rates fixed in the published schedules shall be charged,—see also post, § 33.

* Words in brackets are not a part of section heading as enacted.—Ed.

- Duty of a carrier to afford facilities for the interchange of traffic between connecting lines, — see post, § 35.*
- Duty of a railroad corporation to furnish sufficient cars, motive power, etc.,— see post, § 37.*
- Liability of carrier for loss or damage through delay or injury to property in transit,— see post, § 38.*
- Duty of carrier to provide facilities for continuous carriage without breakage of bulk, etc.,— see post, § 39.*
- Power of Commission to investigate with respect to the adequacy, security and accommodation of the service afforded by the carrier, — see post, § 45, subd. 2.*
- Forfeitures and penalties for making unreasonable charges,— see post, § 56.*
- Power of Commission to correct unreasonable rates,— see post, § 49.*
- General power to regulate property devoted to public use,— see ante, § 1, notes [1]–[22].*
- Charters as contracts with the state,— see ante, § 1, note [7].*
- Effect of reservation of power to amend charter on extent of regulative power,— see ante, § 1, note [12].*
- Exemptions from public control,— see ante, § 1, notes [16]–[21].*
- General rules of statutory construction,— see ante, § 1, notes [23]–[40].*
- Who are common carriers,— see ante, § 2, notes [2]–[7].*
- Effect of receivership on power to regulate,— see ante, § 2, note [15].*
- What statutes regulating rates amount to a regulation of interstate commerce,— see ante, § 25, note [14].*
- Power of carriers to establish through routes and joint rates,— see post, § 30, note [1].*
- When shipper must tender published rate in payment for transportation,— see post, § 33, note [5].*
- General liability of carrier for loss of or injury to goods carried,— see post, § 38, note [9].*
- For questions as to transportation of baggage,— see post, § 38, notes [38]–[44].*
- Power of Commission to compel stopping of trains,— see post, § 49, note [17].*
- Power of Commission to regulate speed of trains,— see post, § 49, note [18].*
- Relief from ordinance regulating speed of trains,— see post, § 49, note [30].*
- Changes of motive power,— see post, § 50, note [3].*

[1] Statutes declaratory of common law.

Construction of statutes declaratory of common law,—see ante, § 1, note [31a].

Purpose of acts regulating railroads,—see ante, § 1, note [32].

Statute forbidding unjust discriminations merely declaratory of common law,—see post, § 31, note [22].

Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Interstate Commerce Act (as it stood March 30, 1896) leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.—*Cincinnati, N. O. & T. P. R. Co. v. Interst. Com. Commission*, 162 U. S. 184, 16 Sup. Ct. R. (U. S.) 700; *Interst. Com. Commission v. B. & O. R. Co.*, 43 Fed. 37; *affd.* 145 U. S. 263, 12 Sup. Ct. R. (U. S.) 844.

So far as a statute recognizes an obligation on the part of railroad companies to furnish their passengers with proper seats, it simply affirms a principle of the common law, and enforces a duty springing from their relations as carriers of passengers, and their undertaking with each passenger is to transport him safely and properly over their road.—*Willis v. L. I. R. Co.*, 34 N. Y. 670, *affg. s. c.* 32 Barb. (N. Y.) 398.

The provisions of the New York Railroad Law as to adequate facilities, etc., substantially declare the common law.—*People ex rel. Ohlen v. N. Y. L. E. & W. R. Co.*, 22 Hun (N. Y.), 533.

[2] General duties and obligations of carriers.

Power of the state to regulate the mode of operation of railroads,—see ante, § 1, note [2].

General duty of carriers not to discriminate as to facilities and service,—see post, § 32, note [1].

Carrier not bound, at common law, to undertake to deliver freight beyond its own lines,—see post, § 35, note [8].

The common law and the New York Railroad Law alike require a carrier to provide reasonable vehicles for the carrying and transportation of the property offered to it for that purpose, and to carry it for a reasonable compensation, and if it refuses to receive and carry property so offered within a reasonable time before the commencement of the trip, it is liable in damages to the party injured by the refusal.—*People ex rel Ohlen v. N. Y. L. E. & W. R. Co.*, 22 Hun (N. Y.), 533.

The purpose of the provisions of the New York Railroad Law as to reasonable charges, accommodations, etc., is to secure a reasonable degree of equity in the business of railways, and to require them to afford the use of their facilities for the transportation of property to all who may have occasion for their employment, and without any unjust or unreasonable discrimination as to the terms of compensation.—*People ex rel. Ohlen v. N. Y. L. E. & W. R. Co.*, 22 Hun (N. Y.), 533.

The duties, functions and property of railroad corporations are held in trust by each corporation for the public, and the sovereign forever regulates such corporation as its trustee.—*People v. N. Y. C. & H. R. R. Co.*, 28 Hun (N. Y.), 543.

A railroad corporation is primarily charged with the duty and burden of providing reasonably adequate and proper roadbed, track, motive power, equipment, and facilities for the service required, and of maintaining and operating its property so as to render to the public without unjust discrimination a reasonably safe and adequate service.—*State v. Atlantic C. L. R. Co.*, — Fla. —, 44 So. 213.

Common carriers are bound to carry indifferently, within the usual range of their business, for a reasonable compensation, all freight offered, and all passengers who may apply. For similar equal services they are entitled to the same compensation. All applying have an equal right to be transported, or to have their freight transported, in the order of their application. They cannot legally give undue and unjust preferences, or make unequal and extravagant charges. Having the means of transportation, they are liable to an action if they refuse to carry freight or passengers without a ground for such refusal.—*New Eng. Exp. Co. v. Me. C. R. Co.*, 57 Me. 188.

[3] Compelling performance.

Compelling issuance of ticket,—see post, note [47].

Mandamus to compel performance of public duties,—see also, post, § 57, note [13].

Mandatory injunctions may be awarded to compel a common carrier to transport freight or to furnish transportation facilities.—*Beech Creek R. Co. v. Planta Coal M. Co.*, 158 Fed. 36.

A shipper may bring action to compel a carrier to receive and transport an interstate shipment of goods without first applying to the Interstate Commerce Commission.—*Danciger v. Wells Fargo & Co.*, 154 Fed. 379.

Railroads have themselves the power to regulate the time and manner in which passengers and property shall be transported, and so long as their operations are not suspended and their duties are not unperformed,

the courts should not interfere, especially upon the application of a private individual, to regulate the exercise of their discretion.—*People ex rel. Wheeler v. L. I. R. Co.*, 31 Hun (N. Y.), 125.

Mandamus will not lie to compel a carrier to furnish transportation, or to charge only a reasonable rate.—*People ex rel. Ohlen v. N. Y. L. E. & W. R. Co.*, 22 Hun (N. Y.), 533.

[4] Effect of ownership of freight by carrier.

That the carrier owns the freight does not relieve it from the provisions of the Interstate Commerce Act.—*In re Grain Rates of Chicago G. W. R. Co.*, 7 Inters. Com. R. 33.

[5] Duty to furnish safe and suitable cars — In general.

See also, ante, note [2].

Exoneration from duty,—see post, note [20].

Regulation of method of heating cars not a regulation of interstate commerce,—see ante, § 25, note [16].

General duty of carrier to furnish cars,—see post, § 37, note [1].

Duty of carrier to furnish special cars and equipment,—see also post, § 37, note [2].

Actions for failure to furnish cars,—see post, § 37, notes [17]–[23].

Power of Commission over cars and equipment,—see post, § 49, note [19].

If a railroad holds itself out as a common carrier of perishable fruit, it must provide the necessary refrigerator cars for the transportation of that commodity.—*Matter of Charges for Transportation of Fruit*, 11 Inters. Com. R. 129.

If a carrier imposes as a condition to the use of refrigerator cars the payment of an icing charge which is prohibitive, it in effect refuses to furnish the cars themselves.—*Re Transportation of Fruit*, 10 Inters. Com. R. 360.

It is the duty of a railroad company to furnish refrigerator cars for the transportation of fruit, but this duty arises not from the Interstate Commerce Act but from the common law duty as carrier.—*Re Transportation of Fruit*, 10 Inters. Com. R. 360.

It is the duty of the carrier to furnish the vehicle of transportation.—*Indep. Ref. Assn. v. W. N. Y. & P. R. Co.*, 4 Inters. Com. R. 162, 5 I. S. C. C. R. 415.

A common carrier is accountable, absolutely and irrespective of negligence, to furnish a safe and roadworthy coach.—*Alden v. N. Y. Cent. R. Co.*, 26 N. Y. 102.

A railroad corporation must see to it that in the construction of the cars, engines etc., used by it, the utmost precaution, care and skill shall be employed to render them sufficient and safe.—*Hegeman v. Western R. Co.*, 13 N. Y. 9, affg. s. c. 16 Barb. (N. Y.) 353.

A street surface railroad corporation, formed under the New York Railroad Law, may run cars exclusively for transporting express or freight.—*De Grauw v. L. I. Elect. R. Co.*, 43 App. Div. (N. Y.) 502, 60 N. Y. Supp. 163; affd. 163 N. Y. 597, 57 N. E. 1108.

A railroad must furnish proper and suitable cars for a shipment.—*St. Louis, I. M. & S. R. Co. v. Marshall*, 74 Ark. 597, 86 S. W. 802; *Indianapolis, B. & W. R. Co. v. Strain*, 81 Ill. 504; *Jones v. St. L. & S. F. R. Co.*, 115 Mo. App. 232, 91 S. W. 158.

Failure to furnish safe and suitable cars makes the initial carrier liable for injuries therefrom, even though occurring beyond the carrier's own line.—*St. Louis, I. M. & S. R. Co. v. Marshall*, 74 Ark. 597, 86 S. W. 802.

That the shipper had prior to making shipment inspected the cars and knew of their defects does not relieve the carrier of his liability for failure to furnish safe and suitable cars.—*St. Louis, I. M. & S. R. Co. v. Marshall*, 74 Ark. 597, 86 S. W. 802.

A duty of furnishing separate trains for passengers and freight can be implied from the duty to furnish necessary rolling stock and equipment for the suitable and proper operation of the road.—*People v. St. L. A. & T. H. R. Co.*, 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656.

A carrier is under obligation to have vehicles suitable for the transportation of various commodities which it carries.—*Sloan v. St. L. K. C. & N. R. Co.*, 58 Mo. 220.

A carrier must furnish vehicles suitable in every respect, including strength and mode of construction for the safe transportation of such property as is usually carried by it.—*Potts v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 394.

Where a railroad carries large quantities of milk, and it would be advantageous to the producers and the public to have it carried in special cars having icing facilities, etc., it is the duty of the railroad to furnish such cars.—*Baker v. Boston & M. R. Co.*, — N. H. —, 65 Atl. 386.

A common carrier is bound to provide sufficient power and vehicles to carry all the goods which his invitation naturally brings to him.—*Branch v. Wilmington & W. R. Co.*, 77 N. C. 347.

Plaintiff asked for refrigerator cars for melons. The carrier had a contract with a car line company to furnish cars for shipments of this sort. Suitable cars were not furnished, and the shipper sent his melons by express and sued for the excess cost. He was permitted to recover

on the ground that if the railroad holds itself out as a carrier of melons, it must furnish the necessary refrigerator cars, etc., and the failure of the car line company to keep its contract does not excuse it.—*Mathis v. So. R. Co.*, 65 S. C. 271, 43 S. E. 684, 61 L. R. A. 824.

In the absence of statutory provisions, it is the duty of a carrier to provide all necessary facilities and means for transporting such property as may be offered, at least to the extent that would ordinarily be expected to seek transportation by that line.—*Houston & T. C. R. Co. v. Smith*, 63 Tex. 322.

[6] — How duty may be discharged.

In cases where it is the duty of a carrier to furnish a refrigerator car, it may discharge this duty by owning the car or leasing it. The measure of responsibility of the carrier to the shipper for the sufficiency of the car is exactly the same whether it obtains the equipment by purchase or by lease.—*Matter of Charges for Transportation of Fruit*, 11 Inters. Com. R. 129.

In fulfilling its duty to furnish refrigerator cars, a railway may provide the same either by purchase on its own account, or by lease, and if the latter plan is adopted, it may enter into a contract whereby it agrees to use the cars of one line exclusively.—*Re Transportation of Fruit*, 10 Inters. Com. R. 360.

Carriers are left by law to procure equipment for their business by lease as well as otherwise and are not prohibited from leasing from a shipper. Nor are they compelled to contract in this respect with all shippers because they have with one.—*Consolidated F. Co. v. So. Pac. R. Co.*, 9 Inters. Com. R. 182.

[7] — Effect of unprecedented rush of business.

See also post, § 37, note [8].

A railroad corporation should supply a reasonable equipment for its road, considering the amount of business likely to be done, but they are not bound to provide for a great, sudden and unexpected influx of business.—*Wibert v. N. Y. & E. R. Co.*, 19 Barb. (N. Y.) 36; *affd.* 12 N. Y. 245.

Since the Texas statute requiring carriers to furnish sufficient accommodations for the transportation of all property that may be offered is simply declaratory of the common law, when an unexpected and unprecedented rush of business occurs, the carrier is generally excusable for refusing to accept the property for transportation.—*Houston & T. C. R. Co. v. Smith*, 63 Texas, 322.

[8] Duty to furnish safe machinery and appliances.

Provisions as to type of switches, warning signals, care and inspection of locomotives, use of appliances, etc.,—see N. Y. R. R. L., § 49.

Power of former Board of Railroad Commissioners as to safeguards,—see N. Y. R. R. L., § 50.

Use of stoves in passenger cars forbidden,—see N. Y. R. R. L., § 51.

“Centre-bearing” rails not to be used in construction of tracks of street surface railroads,—see N. Y. R. R. L., § 109.

Use of safety appliances required by federal Act,—see U. S. Comp. Stat., pages 3174-3176 as amd. by Act of Mar. 2, 1903, ch. 976.

Duty not discharged by purchasing from reputable manufacturers,—see post, note [20].

Excuses for failure to comply with Safety Appliance Act,—see post, note [71].

Power of the state to prescribe the location of tracks and the size and character of rails,—see ante, § 1, note [2].

Limits of state and federal regulation as to safety appliances,—see ante, § 25, note [10].

Compelling relaying of tracks,—see post, § 49, note [30].

The equipment of cars with automatic couplers which will not automatically couple with each other without the necessity of the men going between the cars, is not a compliance with the Act of Congress of March 2, 1893 (27 Stat. 531, c. 196).—*Johnson v. So. Pac. R. Co.*, 196 U. S. 1, 25 Sup. Ct. R. (U. S.) 158.

Locomotive engines are cars within the meaning of the Act of Congress of March 2, 1893 (27 Stat. 531, ch. 196), requiring “any car” engaged in interstate commerce to be equipped with automatic couplers.—*Johnson v. Southern Pacific R. Co.*, 196 U. S. 1, 25 Sup. Ct. R. (U. S.) 158.

A carrier is bound to adopt the most approved modes of construction and machinery in known use in the business, and the best precautions in known practical use, for securing safety. It is not bound to use every possible prevention which the highest scientific skill may have suggested, or to adopt an untried machine or mode of construction.—*Steinweg v. Erie R. Co.*, 43 N. Y. 123.

[9] Duty to render switching services.

Duty of carrier to furnish switch connections,—see post, § 27, note [1].

Duty to receive and deliver freight at private switches,—see post, § 27, note [13].

Switching charges,—see post, § 27, note [14].

Switching cars of live stock beyond the carrier's line and into stock-yards not owned by the carrier, is not a gratuity, but is a service which the shipper has a legal right to demand and which the carrier is under legal obligation to furnish, at an additional charge.—*Cattle Raisers' Assn. v. C. B. & Q. R. Co.*, 11 Inters. Com. R. 277.

[10] Duty as to hauling of sleeping cars and private cars.

Discrimination in hauling of private or sleeping cars,—see post, § 32, note [25].

Refusal to haul cars of a connecting line,—see post, § 35, note [5].

When Commission will compel the hauling of sleeping cars,—see post, § 49, note [30].

A carrier has a right to refuse to haul private cars which it deems dangerous to the safety or celerity of its service.—*Worcester Excursion Car Co. v. Pa. R. Co.*, 1 Inters. Com. R. 811, 2 Inters. Com. R. 12, 792, 3 I. C. C. R. 577.

A railroad company is not a common carrier of sleeping cars, and hence may transport them on such conditions as it is willing to make.—*Chicago, R. I. & P. R. Co. v. Hamler*, 215 Ill. 525, 74 N. E. 705.

[11] Duty to receive and transport.

See also, ante, note [2].

Compelling carrier to transport,—see ante, note [3], post, § 57, note [13].

Remedy for failure or refusal to transport,—see post, note [15].

Exoneration from duty,—see post, note [20].

Right of carrier to prescribe the time for reception of freight,—see post, note [22].

Refusal to transport as discrimination,—see post, § 32, note [15].

Establishment of embargo,—see post, § 32, note [22].

Duty of connecting carrier to forward goods in order of receipt,—see post, § 35, note [26].

Liability of carrier for delay in transporting,—see post, § 38, notes [29]–[37].

Consignments of freight must be transported in the order of receipt, see post, § 38, note [34].

A state statute provided that “a common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry.”—*Held*, that this did not obligate an express company to receive currency for transportation at a time when it would be necessary to store the same

over night awaiting a morning train, it being the general rule of the company not to so receive such consignments.—*Platt v. Le Cocq*, 158 Fed. 723.

An express company cannot refuse to transport liquors to and from persons who have a right to receive and ship the same.—*Crescent Liquor Co. v. Platt*, 148 Fed. 894.

An Arkansas statute (§ 6193, Sandels & H. Dig. Ark.) declares that railroad companies "shall furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer or be offered for transportation at the place of starting and the junctions of other railroads, and at sidings and stopping places established for receiving and discharging * * * passengers and freights, and shall take, transport and discharge such passengers and property at, from and to such places on due payment of tolls," etc.—*Held*, this cannot be understood as depriving the carrier of the right to make reasonable regulations applicable to all persons and corporations relative to the manner in which such a commodity as coal shall be delivered for transportation, nor as compelling the carrier to set out on its sidetracks at such stations coal cars to be there loaded by means of wagons. That view of the statute, if adopted, would deprive the carrier of the power to serve the public in the most efficient, speedy and economical manner, and it will not be presumed that such was the purpose of the legislature. If the statute in question operates to modify the common law at all, it only modifies it to the extent of compelling railroads to carry all kinds of property which is tendered for carriage instead of only such property as they make a public profession of carrying.—*Harp v. Choctaw, O. & G. R. Co.*, 125 Fed. 445.

Loading the freight upon the cars is incumbent on the carrier, and it cannot, as a condition of transporting the goods, require the shipper to do the loading.—*London & L. Fire Ins. Co. v. Rome, W. & O. R. Co.*, 144 N. Y. 200, 39 N. E. 79, affg. s. c. 68 Hun (N. Y.), 598, 23 N. Y. Supp. 231.

A railroad corporation may not refuse or neglect to perform its public duties, simply because of a controversy with its employees over the cost of their part in performing such functions. The duties imposed must be discharged at whatever cost, and cannot be laid down or abandoned or suspended without the legally expressed consent of the state.—*People v. N. Y. C. & H. R. R. Co.*, 28 Hun (N. Y.), 543.

The transportation of express matter over railroads as a business separate from that of the railroad companies themselves, finds sanction only in the superiority of the service in the respects of speedy collection, transportation and delivery, and for such special and rapid service the justice of rates reasonably higher than those imposed for ordinary rail-

road freight service is recognized. This implies, however, that such speedy and special service shall always be afforded, and the mere circumstance that one express company may have the only express office at the destination point and be one of two or more companies at the shipping point does not of itself constitute justification for confining all express service between the shipping and destination points to the route of that particular express company, especially when its route is circuitous and much speedier service could be rendered over a through route composed of the lines of two or more other express companies.—*Herendeen v. U. S. Exp. Co.* Decided by the N. Y. Public Service Commission of the Second District, Feb. 18, 1908.

When a state confers or permits the exercise of the various rights and powers enjoyed by railroad corporations, the law imposes upon the railroad corporation receiving or exercising them the duty of rendering to the public a service adequate to meet all reasonable requirements.—*State v. Atlantic C. L. R. Co.*, — Fla. —, 44 So. 213.

A railroad is bound to receive and carry safely all property tendered for shipment.—*Merchants D. Transp. Co. v. Thielbar*, 86 Ill. 71.

A carrier has the right to deny transportation to a person mentally or physically disabled, only if he appears to be unable to care for himself or likely to require extra attention.—*Illinois Cent. R. Co. v. Smith*, 85 Miss. 349, 37 So. 643; *Weightman v. R. Co.*, 70 Miss. 563, 12 So. 586; *Sevier v. R. Co.*, 61 Miss. 8.

The amount of business ordinarily done by a railroad is the only proper measure of its obligation to furnish transportation.—*Louisville & N. R. Co. v. Queen City Coal Co.*, 99 Ky. 217, 18 Ky. L. R. 126, 35 S. W. 626; *Ballentine v. No. Mo. R. Co.*, 40 Mo. 491; *State ex rel. Crandall v. C. B. & Q. R. Co.*, 72 Neb. 542, 101 N. W. 23; *State ex rel. McComb v. C. B. & Q. R. Co.*, 71 Neb. 593, 99 N. W. 309.

[12] Extent to which carrier holds itself out as such as affecting duty.

The nature and extent of the employment of business which a common carrier expressly or impliedly holds itself out as undertaking, furnishes the limits of their rights, duties, obligations and liabilities.—*Citizens' Bank v. Nantucket S. Co.*, 2 Story (U. S.), 16.

In the absence of provisions in the charter or the statutes, it is competent for a railroad company to fix its own policy as to the limits within which it will act as a common carrier, what business it will engage in, what means and methods of transportation it will employ, what goods it will carry, between what points and under what circumstances it will accept them, providing it acts in good faith, reasonably, and without interest to discriminate, doing for all under like circumstances what it does for anyone.—*Harp v. Choctaw, O. & G. R. Co.*, 118 Fed. 169; *affd.* 125 Fed. 445.

A clause in the charter of a railroad company, requiring it to transport "all merchandise and property," does not oblige it to become a common carrier of money.—*Kuter v. Mich. Cent. R. Co.*, 1 Biss. (U. S.) 35, Fed. Cases, No. 7955.

A stockyards company, having by its charter an option of becoming a common carrier, which becomes such a carrier as to dead freight, but does not undertake to carry live stock, merely permitting railroads to use its tracks for that purpose, is not a common carrier of live stock.—*Cattle Raisers' Assn. v. Fort Worth & D. C. R. Co.*, 7 Inters. Com. R. 513.

A carrier need not furnish facilities to transport all personal property that may be tendered it, but only such as it is accustomed to carry.—*Pfister v. Cent. R. Co.*, 70 Cal. 169, 11 Pac. 686.

A railroad is a common carrier only of what it holds itself out to carry. It may carry only freight or only passengers, or only a particular class or classes of freight.—*Wiggins Ferry Co. v. East St. L. U. R. Co.*, 107 Ill. 450.

A common carrier is not bound to carry for every person tendering goods of any description, but only according to its public profession.—*Johnson v. Midland R. Co.*, 4 Exch. (Eng.) 367.

A railroad is not bound to carry every description of goods, and between all places on its line, but only such goods and from such places as it has publicly professed to do, and has conveniences for the purpose.—*Johnson v. Midland R. Co.*, 4 Exch. (Eng.) 367.

[13] Delivery as part of transportation.

Transportation by rail undoubtedly involves a suitable delivery.—*St. L. Hay & G. Co. v. C. B. & Q. R. Co.*, 11 Inters. Com. R. 82.

[14] What constitutes a tender of goods for transportation.

A "tender" of cars by a shipper for transportation consisted of repeated notifications and requests.—*Held*, that this was sufficient to impose a liability on the carrier, as anything further on shipper's part would have been a waste of time and money.—*State ex rel. Cumberland T. & T. Co. v. T. & P. R. Co.*, 52 La. Ann. 1850, 28 So. 284.

[15] Remedy against carrier for failure to transport.

Whether statutory remedies supplant existing remedies,—see post, § 40, note [2].

Where a carrier refused to receive goods for carriage except upon payment of an unreasonable sum, the shipper, at common law, had a right of action in damages.—*Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. (U. S.) 350, revg. s. c. 12 Tex. Ct. R. 498, 85 S. W. 1052.

A statute will not be construed as taking away a common law right existing at the date of its enactment, unless it is found that the pre-existing right is so repugnant to the statute that its survival would in effect deprive the subsequent statute of its efficacy.—*Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. R. (U. S.) 350, revg. s. c. 12 Tex. Ct. R. 498, 85 S. W. 1052.

A complaint alleging a conspiracy between railroad companies and an association of elevator owners whereby the latter refused to handle the grain of a particular elevator, states a good cause of action.—*Kellogg v. Lehigh V. R. Co.*, 61 App. Div. (N. Y.) 35, 70 N. Y. Supp. 237.

Refusal to furnish facilities, etc., is merely a private injury for which the remedy by an action for damages is adequate and complete.—*People ex rel. Ohlen v. N. Y. L. E. & W. R. Co.*, 22 Hun (N. Y.), 533.

The measure of compensation for refusing to furnish facilities, etc., is the difference, less the expenses of transportation, between the value of the property at the place where it was offered and that to which it was intended to be taken.—*People ex rel. Ohlen v. N. Y. L. E. & W. R. Co.*, 22 Hun (N. Y.), 533.

In an action against a railroad for refusal or delay to receive and transport goods, the shipper must show a tender of the customary price of carrying the goods offered for shipment, or a readiness and willingness to pay according to the course and usage of the company in such case.—*Galena & C. U. R. Co. v. Rae*, 18 Ill. 488.

Having the means of transportation, carriers are liable to an action if they refuse to carry freight or passengers without a ground for such refusal.—*New Eng. Exp. Co. v. Me. C. R. Co.*, 57 Me. 188.

Texas statute required carriers to furnish adequate transportation for all property, and made them liable for damages from their refusal, etc.—*Held*, that the shipper could recover, on showing tender of goods and readiness to pay freight charges.—*Galveston, H. & S. A. R. Co. v. Schmidt*, 25 S. W. 452 (Tex.).

If a company wrongfully refuses to carry property, the measure of damage is the difference between its value at the place of destination when, if carried, it should have reached there, and its value, at such time, at the place whence it should have been taken, including the necessary expense of storing, loss by deterioration, etc., accruing by reason of its detention, and deducting the reasonable expense of transportation.—*Galena & C. U. R. Co. v. Rae*, 18 Ill. 488.

[16] Duty as to depots and grounds.

Provisions relating to stations and use of stations and grounds,—see N. Y. R. R. L., § 34.

Establishment and maintenance of stations and waiting rooms,—see post, § 50, note [4].

It is a railroad's duty to afford a safe and convenient passage from its depot to the highway.—*Hoffman v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 605, affg. s. c. 13 Hun (N. Y.), 589.

A painted car body, no matter how strong or durable it may be, is not a proper facility for the storage of incoming and outgoing freight in any locality of sufficient consequence to be a station for the reception and delivery of freight traffic.—*Rockland Co. Citizens v. N. J. & N. Y. R. Co.* Decided by the N. Y. Public Service Commission for the Second District, April 16, 1908.

[17] Duty to furnish passengers with seats.

Statute obliging carriers to furnish passengers with seats merely declaratory of common law,—see ante, note [1].

Standing room in the passage way is not proper accommodation for passengers.—*Willis v. L. I. R. Co.*, 34 N. Y. 670, affg. s. c. 32 Barb. (N. Y.) 398.

A city ordinance required that between certain hours a sufficient number of street-cars should be run to provide a seat for every passenger from whom a fare was demanded.—*Held*, that it not appearing that the ordinance was under all circumstances unreasonable and oppressive, it should be permitted to stand, to be enforced except in cases where it might be made to appear that the operation of the provisions were unreasonable or oppressive.—*North Jersey St. R. Co. v. Jersey City*, — N. J. L. —, 67 Atl. 1072.

The contract of a carrier of passengers by railway is one not only to furnish the passengers with transportation but also with a seat. The passenger need not surrender his ticket until he is furnished with a seat. If the passenger chooses to accept transportation without a seat, he must, on demand, pay his fare. If unwilling to ride unless a seat is furnished him, he must get off at the first opportunity, and may recover as damages such sum as will compensate him for the breach of the contract, including such damages as are the natural and immediate result of such breach.—*Memphis & C. R. Co. v. Benson*, 85 Tenn. 627, 4 S. W. 5.

[18] Duty to render special services.

Duty of carrier to publish charges for special services, —see post, § 28, notes [19]–[21].

Discriminations in charges for specific services,—see post, § 31, note [62].

Refrigeration, etc., is a part of the reasonable facilities which must be furnished by a carrier holding itself out to carry perishable commodities.—*The Southwark*, 191 U. S. 1, 24 Sup. Ct. R. (U. S.) 1.

The court will, in a proper case, require a carrier to furnish proper facilities for the loading and unloading of livestock.—*Butchers & Drovers' Stockyards Co. v. L. & N. R. Co.*, 67 Fed. 35.

A carrier may construct and operate an elevator of its own, or make some arrangement with the owner of an elevator for such a service.—*Allowances to Elevators by U. Pac. R. Co.*, 12 Inters. Com. R. 99.

A carrier may furnish elevation for grain at any point where it may be convenient for shippers, whether at the destination or for transfer in transit.—*Allowances to Elevators by U. Pac. R. Co.*, 12 Inters. Com. R. 99.

A carrier may unload for consignees at the destination if it does so for all shippers alike.—*Allowances to Elevators by U. Pac. R. Co.*, 12 Inters. Com. R. 99.

Icing and refrigeration of cars is not a mere incident to the transportation service, but is part of that service itself.—*Matter of Charges for Transportation of Fruit*, 11 Inters. Com. R. 129.

A carrier cannot refuse to furnish the ice and supervise the icing of a refrigerator car.—*Matter of Charges for Transportation of Fruit*, 11 Inters. Com. R. 129.

The duty of a carrier holding itself out to carry perishable fruit is not simply to furnish a refrigerator car, but to ice the car and keep it at a proper temperature.—*Matter of Charges for Transportation of Fruit*, 11 Inters. Com. R. 129.

The stopping of a commodity in transit for the purpose of treatment or reconsignment is in the nature of a special privilege, which the carrier may concede, but which the shipper cannot, in the present state of the law, demand as a matter of lawful right. — *St. Louis Hay & G. Co. v. Mobile & O. R. Co.*, 11 Inters. Com. R. 90.

Carriers must furnish ice for use in refrigerator cars.—*Re Transportation of Fruit*, 10 Inters. Com. R. 360.

A carrier fulfills its duty by furnishing reasonable terminal facilities for the various kinds of traffic. It is not bound to furnish the same facilities for all descriptions of traffic. What is reasonable provision in a given instance depends largely on the conditions and surroundings of the particular locality.—*Palmer's Board of Trade v. Pa. R. Co.* 9 Inters. Com. R. 61.

If all shippers applying cannot be provided with desired facilities, the plan or method adopted should be the one affording the largest public accommodation with the smallest amount of individual hardship.—*Palmer's Board of Trade v. Pa. R. Co.*, 9 Inters. Com. R. 61.

Where one road has a contractual right to run over the tracks of another company to reach points on its own line, the Interstate Commerce Act does not require it to receive or discharge traffic at points on the

line of such other company, where the sufficiency of the local service rendered by the latter is not questioned.—*Alford v. Chicago, R. I. & P. R. Co.*, 2 Inters. Com. R. 582, 771, 3 I. S. C. C. R. 473.

It is the duty of railroads, so far as they have authority under their charter and the laws, to increase their business by all usual and customary means, and to furnish the public with all needful facilities for safe, cheap and speedy transportation.—*Stewart v. Erie & W. Transp. Co.*, 17 Minn. 372.

When a railroad puts a refrigerator car of a transportation company into its train, it thereby makes such car its own, and puts on itself the duty of keeping it properly refrigerated, so that for failure so to do it is liable to the shipper.—*New York, P. & N. R. Co. v. Cromwell*, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 462.

An act requiring a railroad to afford all reasonable facilities for the receiving and forwarding of traffic, etc., does not compel a company to maintain or use its railway or stations.—*Darlaston Local Board v. London & N. W. R. Co.*, 1894, 2 Q. B. D. (Eng.) 694

[19] Determination as to fulfillment of duty.

The term "adequate and reasonable facilities" to which any community is entitled is a relative expression and may be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing additional accommodations asked for and to all other facts which would have a bearing upon the question of convenience and cost.—*Atlantic C. L. R. Co. v. Wharton*, 207 U. S. 328, 28 Sup. Ct. R. (U. S.) 121, revg. s. c. 74 S. C. 80, 54 S. E. 224.

A 15.4 per cent. winter reduction in the suburban train service of a railroad from that extended in the summer, held not to be unreasonable in view of the fact that as compared with the summer months, there was an 80 per cent. diminution in the number of commuters using these trains in the winter.—*Residents on Far Rockaway Branch v. L. I. R. Co.* Decided by the N. Y. Public Service Commission of the Second District, February 19, 1908.

Additional train service ordered on the line of the New Jersey and New York R. Co. between New City and Nanuet.—*Rockland Co. Citizens v. N. J. & N. Y. R. Co.* Decided by the N. Y. Public Service Commission for the Second District, April 16, 1908.

What constitutes reasonable and adequate facilities for the handling of particular traffic is a question of fact under the circumstances.—*Baker v. Boston & M. R. Co.* — N. H. —, 65 Atl. 386.

In determining whether or not the roadbed, track, rolling stock, and other equipment of a common carrier is reasonably sufficient, and is

being maintained and operated in a reasonably safe and adequate condition, and is being managed for the proper rendering of the public service the corporation has undertaken to perform, the conditions under which the service is being rendered, the character and extent of the service, its reasonable requirements and the means, facilities and methods best suited to such service in common use will be considered by the court, together with any other material and pertinent matters available.—*State v. Atlantic C. L. R. Co.*, — Fla. —, 44 So. 213.

[20] Exoneration from obligations as carrier.

Orders of military authorities as justifying discriminations,— see post, § 31, note [53].

That the delay of a train was due to the wilful and unauthorized act of a conductor is no defense to an action against a carrier for its failure to transport a passenger with proper dispatch.—*Weed v. Panama R. Co.*, 17 N. Y. 362, affg. s. c. 5 Duer (N. Y.), 193.

That it may involve him in a strike does not excuse the receiver of a railroad from receiving from, and delivering to, a connecting railroad empty or loaded freight cars.—*Beers v. Wabash, St. L. & P. R. Co.*, 32 Fed. 244.

A carrier cannot refuse to perform its duties as a carrier, in order to compel prepayment of demurrage charges.—*Macloon v. Ch. & N. W. R. Co.*, 3 Inters. Com. R. 452, 711, 5 I. S. C. C. R. 84.

The public obligation of a railroad corporation to run its cars and carry passengers transcends its obligation to its stockholders. It cannot cease to perform these functions for any length of time to beat down the price or conditions of labor. It must pay whatever price is necessary to get the labor with which to perform its public duty.—*Matter of Loader*, 14 Misc. (N. Y.) 208, 35 N. Y. Supp. 996.

The mere striking of the employees of a railroad will not excuse it from the duty to receive and transport freight.—*People v. N. Y. C. & H. R. R. Co.*, 28 Hun (N. Y.), 543.

Unfortunate or improvident management of its finances by a common carrier corporation, and neglect in the maintenance and operation of its line and equipment cannot be held to exempt or excuse the carrier from reasonable compliance with the requirements of the N. Y. Public Service Commissions Law as to safe and adequate service.—*In re Port Jervis Elect. L., P., G. & R. R. Co.* Decided by the N. Y. Public Service Commission for the Second District May 12, 1908.

A carrier will not be excused from performing any duty required of it by its charter, on the ground that such performance would be unprofitable.—*Savannah & O. Canal Co. v. Shuman*, 91 Ga. 400, 17 S. E. 937.

The duty of a carrier as to its bridges is not discharged by purchasing its iron work from reputable manufacturers, but it is bound to inspect and test the bridges from time to time.—*Louisville, N. A. & C. R. Co. v. Snyder*, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434.

A carrier cannot exonerate himself from the obligation to furnish suitable cars and means of transacting his business.—*Mason v. Mo. Pac. R. Co.*, 25 Mo. App. 473.

[21] Sleeping cars considered as cars of carrier.

A Pullman or other special car, whether obtained by the carrier by purchase or by lease, is to every practical intent the car of the carrier.—*Pennsylvania R. Co. v. Roy*, 102 U. S. 457.

[22] Rules and regulations by carrier.

Rules as to time of asking for transfer,—see post, note [62].

Reasonableness of time limit on transfers,—see post, note [67].

Reasonableness of regulations as to method of operation,—see post § 49, note [31].

In the absence of statutory regulation a carrier is entitled to establish and promulgate reasonable rules and regulations governing the manner in which it will conduct its business, and it follows that the carrier has also the power to alter or modify such rules from time to time as it may deem expedient, upon reasonable notice to the public.—*U. S. v. Oregon R. & N. Co.*, 159 Fed. 975.

A carrier has the right to make and enforce reasonable regulations which may lawfully fix the times, the places, the methods and the forms in which it will receive the various commodities it undertakes to carry, and rules thus adopted are presumptively reasonable.—*Platt v. Le Cocq*, 158 Fed. 723.

A shipper should not be subjected to unnecessary restriction as to the kind of case or package he shall use.—*Rhode Island Egg Co. v. L. S. & M. S. R. Co.*, 6 Inters. Com. R. 176.

Railroad corporations have the right to prescribe the time for reception of freight for transportation.—*Bouker v. L. I. R. Co.*, 89 Hun (N. Y.), 202, 35 N. Y. Supp. 23.

A passenger on a street railroad is not bound by rules of which no reasonable notice has been given to the public.—*McGowan v. N. Y. City R. Co.*, 99 N. Y. Supp. 835.

A rule of an express company provided: "Agents at common points must decline to accept for transportation business originating at their offices, destined to exclusive offices of other companies having offices at points of origin." This rule was amended by adding the following, "provided, however, that the said shipment shall not be refused if the shipper

insists upon forwarding it and tenders the Agent the full amount necessary to pay the charges of this company in advance, at its regular local rate, to the point of transfer to the connecting company," etc.—*Held*, that the rule is open to serious objection inasmuch as it is not only contradictory in its terms, but is certain in practice to have discriminating effect as between shippers who insist upon the transportation, notwithstanding the agent's refusal, and shippers who do not insist upon the transportation after the agent shall have refused the shipments.—*Heren-deen v. U. S. Exp. Co.* Decided by the Public Service Commission of the Second District, Feb. 18, 1908.

Independently of statute, carriers have a right to adopt reasonable rules and regulations as to the places where they will receive freight for transportation.—*Rhodes v. No. Pac. R. Co.*, 34 Minn. 87.

The validity of regulations of a railroad as to its transportation of passengers depends not on their lawfulness, but upon their reasonableness.—*State v. Overton*, 24 N. J. L. 435.

[23] Nature of passenger tickets.

Mandamus to compel issuance of tickets,—see post, note [47].

Recovery of penalties for refusal to issue mileage books,—see post, note [68].

Constitutionality of mileage book acts,—see ante, § 1, note [15].

Whether mileage book acts are regulations of interstate commerce,—see ante, § 25, note [14].

Regulations as to transferability of tickets should be published,—see post, § 28, note [21].

Effect of failure to file regulation as to tickets,—see post, § 28, note [25].

Discrimination in issuing of passenger tickets,—see post, § 31, note [57].

Issuance of special tickets and mileage,—see post, § 33, notes [18]–[22].

Issuance of party-rate tickets not illegal,—see post, § 33, note [20].

Obligation of carrier to honor tickets of connecting line,—see post, § 35, note [22].

Ticket as source of carriers' obligation to carry baggage,—see post, § 38, note [39].

Power of Commission to compel issuance of special tickets,—see post, § 49, note [16].

A passenger ticket is a mere voucher or token that the party holding it has paid his fare.—*Quimby v. Vanderbilt*, 17 N. Y. 306; *Bussman v. Western Transit Co.*, 9 Misc. (N. Y.) 410, 29 N. Y. Supp. 1066; *Nevins v. Bay State Ss. Co.*, 4 Bosw. (N. Y.) 225.

[24] Private car system not favored.

Carriers' regulations as to transportation of private cars to be published in schedule,—see post, § 28, note [18]

The use of private cars, especially for business purposes, is not favored in law and ought not to be encouraged by the Interstate Commerce Commission.—*Carr v. No. Pac. R. Co.*, 9 Inters. Com. R. 1.

[25] Regulation of rates on single lines and through routes.

The provisions of the Interstate Commerce Act apply alike to rates on a single line and to rates under a through route formed by two or more carriers.—*Consolidated F. Co. v. So. Pac. R. Co.*, 9 Inters. Com. R. 182.

[26] Meaning of term "rate."

The word "rate," as used in the Interstate Commerce Act, means the net cost to the shipper of the transportation of his property; that is to say, the amount the carrier collects from the shipper and retains.—*U. S. v. Ch. & A. R. Co.*, 148 Fed. 646.

[27] Rebilling rates.

Rules as to reconsignment of freight should be stated in schedules,—see post, § 28, note [18].

Additional charge for reconsignment privilege not discrimination,—see post, § 31, note [62].

A true "rebilling rate" is one by which goods received in unbroken carload lots over one line of railroad can be rebilled over the same or another line, completing one continuous trip of the same commodity simply changing the consignee, and altering the destination of the identical shipment, without unloading or handling the freight.—*Alabama & V. R. Co. v. R. R. Commission*, 86 Miss. 667, 38 So. 356.

[28] Discretion of carrier in fixing rates.

See also post, § 31, note [2].

In fixing rates for differing but analogous services, the carrier has the right to exercise an honest discretion.—*Carr v. No. Pac. R. Co.*, 9 Inters. Com. R. 1.

[29] Just and reasonable rates and charges—Duty to charge.

Rates shall not be relatively unreasonable,—see post, §§ 31, 32, 35, 36.

Compelling carrier to charge reasonable rate,—see ante, note [3].

General power of the state to regulate rates and charges,—see ante, § 1, note [2].

Switching charges,—see post, § 27, note [14].

Duty of carrier to file and publish schedule of rates,—see post, § 28, note [2].

Duty of carriers not to unduly discriminate as to rates,—see post, § 31, note [1].

Discretion of carrier in fixing rates,—see also ante, note [28], post, § 31, note [2].

Power of legislature to forbid discriminations,—see post, § 32, note [2].

Indictments for failure to charge the published rate,—see post, § 33, note [2].

Power of Commission to sanction rates which are unreasonable,—see post, § 49, note [8].

Mandamus to compel charging of reasonable rate,—see post, § 57, note [13].

The constitutional requirement of equal protection of the laws does not require that all public utility corporations exacting tolls should be placed on the same footing as to rates, as justice to the public and to the stockholders may require in respect to some road rates very different from those prescribed for other roads and rates on one road may be reasonable and just to all concerned, while on another road the same rates would be exorbitant and unreasonable.—*Covington & L. Turnpike Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. R. (U. S.) 198, revg. s. c. 14 Ky. L. R. 689, 20 S. W. 1031.

The instructions to a receiver of common carrier were: (1) All charges made for any service in the transportation of passengers or property, or for receiving, delivering, storing or handling property, must be reasonable and just. (2) He will not discriminate in his rates, charges and facilities against any connecting line, but will give to both equal rates and facilities for equal service, from all points.—*Cutting v. Florida R. & N. Co.*, 30 Fed. 663.

Charges for icing and refrigeration must be reasonable and just.—*Matter of Charges for Transportation of Fruit*, 11 Interst. Com. R. 129.

Where a carrier furnishes ice for refrigeration, and prohibits the shipper from obtaining it from any other source, the price must be reasonable, and that price is a part of the total charge for the transportation service afforded by the carrier.—*Re Transportation, etc., of Fruit*, 10 Interst. Com. R. 360.

Demurrage and storage charges shall be reasonable and just.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Interst. Com. R. 531.

Rates cannot be arbitrarily fixed, in the mere discretion of the carrier, but must be adjusted in the interest of the public, as well as of the carrier.—*Lehmann v. So. Pac. R. Co.*, 2 Interst. Com. R. 548, 3 Interst. Com. R. 80, 4 I. C. C. R. 1.

Where a fast freight line operates over several railroads, which divide the earnings, etc., such roads must at their peril see to it that the rates

charged do not violate the law.—*Boston & A. R. Co. v. Boston & L. R. Co.*, 1 Inters. Com. R. 291, 400, 500, 1 I. C. C. R. 158.

The charges made by a common carrier must be reasonable and not excessive.—*Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, affg. s. c. 68 Hun (N. Y.), 486, 22 N. Y. Supp. 976; *Root v. L. I. R. Co.*, 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331n; *Killmer v. N. Y. C. & H. R. R. Co.*, 100 N. Y. 395, 3 N. E. 293.

A railroad is not bound to establish commutation rates for a particular locality.—*State ex rel. Atwater v. D. L. & W. R. Co.*, 48 N. J. L. 55, 2 Atl. 803.

Common carriers are bound to carry freight at reasonable charges, if freight and such charges are offered them.—*Pickford v. Grand J. R. Co.*, 10 M. & W. (Eng.) 399.

[30] — Right to charge.

Right of carrier to earn a profit merely incidental,—see ante, § 1, note [4].

Compensation of carriers a payment in the nature of a tax,—see ante § 1, note [5].

Right to charge as implied from rights given by charter,—see ante, § 1, note [9].

Right of carrier to exact demurrage charges,—see post, § 37, note [26].

Right of carrier to earn reasonable return on its investment,—see post, § 49, notes [32]–[33].

How great a return on the investment should be allowed,—see post, § 49, note [37].

The right to demand fare of a passenger on a railroad is neither an implied nor incidental power, and can be exercised only under authority of statute.—*Johnson v. Hudson R. R. Co.*, 2 Sweeny (N. Y.), 298; revd. on other points, 49 N. Y. 455.

[31] — Reasonableness a question of fact.

Whether given rates violate provisions of the Interstate Commerce Act is a question of fact.—*Export & Domestic Rates*, 8 Inters. Com. R. 214.

[32] — Carrier may determine reasonableness in the first instance.

Power of Commission to determine as to rates,—see post, § 49, notes [6]–[12].

Carriers, under the Interstate Commerce Act, are entitled to determine for themselves what are proper rates in the first instance.—*National Hay Assn. v. L. S. & M. S. R. Co.*, 9 Inters. Com. R. 264.

[33] — How question of reasonableness is determined.

Published rates the standard of reasonableness,—see post, § 28, note [13].

Secrecy of a rate not the test of its lawfulness,—see post, § 31, note [12].

Reasonableness of rate per se material in determining comparative reasonableness,—see post, § 31, note [27].

Matters to be considered in determining as to reasonableness of rates,—see also, post, § 49, notes [38]–[71].

The Interstate Commerce Commission, deeming a terminal charge of \$2 per car for the transferring of cars over the tracks of the Union Stock Yards Co. to be unreasonable, ordered a reduction of such charge to \$1, basing its action on the fact that the through rates of the railroads, composed of the rates for transportation on the said roads and the terminal charge, were too high.—*Held*, that the action of the Commission was unwarranted, as the reasonableness of each segregated rate must be determined by itself.—Decision of the U. S. Circuit Court, Eighth Circuit, June 30, 1908.

The phrase “rates reasonable in and of themselves” is very likely to be misleading. It is a phrase which seems to imply that the particular rates may be considered by themselves as if they were and could be affected by no others. But it is not the theory of the Interstate Commerce Act that the reasonableness of rates can thus be separately and independently determined. On the contrary, it is assumed in the Act that persons, corporations and localities are interested, not only in the rates charged to them, but also in the rates that are charged to others; and while the Act does not require all rates to be proportional, it nevertheless makes the element of proportion an important one when the rates for any locality are to be determined. No rates can therefore be reasonable in and of themselves within the contemplation of the Interstate Commerce Act which are made regardless of proportion.—*Marten v. L. & N. R. Co.*, 9 Inters. Com. R. 581.

Every question as to the reasonableness of a rate may present itself in two aspects: first, is the rate reasonable, estimated by the cost and value of the service, and as compared with other commodities; second, is it reasonable in the absolute, regarded more nearly as a tax laid upon the people who ultimately pay that rate.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

A rate can seldom be considered “in and of itself.” It must be taken almost invariably in relation to and in connection with other rates. Freight rates, both upon different commodities and between different localities, are largely interdependent, and it is the fact that they do not bear a proper relation to each other, rather than the fact that they

are absolutely too high or too low, which most often gives occasion for a complaint.—*Tileston Mill Co. v. No. Pac. R. Co.*, 8 Inters. Com. R. 346.

The question of the reasonableness of rates does not always depend on the opinion of competent witnesses, but is often determined by a comparison of rates, records, etc., filed with the Interstate Commerce Commission.—*Delaware Grange v. N. Y. P. & N. R. Co.*, 3 Inters. Com. R. 828, 5 I. C. C. R. 161.

[34] — Burden of proof.

Burden of proving reasonableness of advances in rates,—see post, note [39].

Burden of proof in actions to recover overcharges,—see post, note [54].

Rates fixed by commission prima facie reasonable,—see ante, § 23, note [1].

Presumption of legality of rates filed and posted,—see post, § 28, note [14].

The burden of showing the unreasonableness of rates is on the complainant.—*Holmes v. So. R. Co.*, 8 Inters. Com. R. 561.

If rates are complained of as unreasonable but no discrimination is alleged, either as between different points of production tributary to the same market, or on account of disproportionate rates on different kinds of traffic similar in character and volume, the burden is on the complainant of establishing affirmatively that such charges are in themselves excessive.—*Lincoln Creamery Co. v. U. Pac. R. Co.*, 3 Inters. Com. R. 641, 794, 5 I. S. C. C. R. 156.

[35] — Higher rates for special services.

Power of Commission to regulate charges for special services,—see post, § 49, note [12].

Cars containing shipments of grain to a certain point were at that place put on a "hold track" by the carrier awaiting the inspection of the grain, after which inspection it was the custom to reconsign the shipments not intended for local use.—*Held*, that the additional service in switching and holding for inspection justified a reconsignment charge of \$2 per car.—*Board of Trade v. C. B. & Q. R. Co.*, 12 Inters. Com. R. 200.

An additional expense incurred by a carrier in switching in and out of a warehouse, justifies an additional charge.—*St. Louis Hay & G. Co. v. Mobile & O. R. Co.*, 11 Inters. Com. R. 90.

Milling in transit is a special privilege, for which additional compensation may be exacted by the carriers.—*Diamond Mills v. Boston & M. R. Co.*, 9 Inters. Com. R. 311.

Shippers have no common law right to mill grain in transit and forward the product on the through rate from the point of origin to the ultimate destination.—*Diamond Mills v. Boston & M. R. Co.*, 9 Inters. Com. R. 311.

A higher rate for a special service by a carrier is lawful.—*Loud v. South Car. R. Co.*, 4 Inters. Com. R. 205, 5 I. S. C. C. R. 529.

A higher rate for a special service, such as the moving of perishable freight, should bear an equitable relation to the value of the service to the traffic, and it cannot be fixed arbitrarily by the carrier.—*Delaware Grange v. N. Y. P. & N. R. Co.*, 3 Inters. Com. R. 554, 4 I. S. C. C. R. 588.

The superiority of express service over ordinary railroad freight service in the respects of speedy collection, transportation and delivery, justifies the imposing of rates reasonably higher than those imposed for ordinary freight service.—*Herendeen v. U. S. Exp. Co.* Decided by the N. Y. Public Service Commission of the Second District, Feb. 18, 1908.

[36] — Rebates as evidence that rates are unnecessarily high.

Granting of rebates to favored shippers is evidence that the rates rebated from are unnecessarily high.—*Cook v. Chicago, R. I. & P. R. Co.*, 81 Iowa, 551, 46 N. W. 1080, 9 L. R. A. 764.

[37] — Whether rates are reasonable.

Reasonableness of switching charges,—see post, § 27, note [14].

Reasonableness of demurrage charges,—see post, § 37, note [27].

What is the lawful charge for through transportation when no joint rate has been established,—see post, § 30, note [8].

What rates are comparatively reasonable,—see post, § 31, note [66].

Where a carrier separately states its rates for transportation and its rates for icing cars, its collection of both charges when refrigeration is used is lawful, if they are reasonable and do not amount to a double charge for the same service.—*Knudsen-Ferguson Fruit Co. v. Mich. Cent. R. Co.*, 148 Fed. 968.

No rate can possibly be reasonable that is higher than anybody else has to pay.—*U. S. v. Ch. & A. R. Co.*, 148 Fed. 646.

Evidence tending to show that rates between certain points are too high as compared with rates from the same initial points to other points is not sufficient to show that the first named rates are of themselves unreasonable under Inters. Com. Act, § 1.—*Interst. Com. Commission v. Nashville, C. & St. L. R. Co.*, 120 Fed. 934.

Rates to a noncompetitive point cannot be held unjust or unreasonable in themselves, and therefore unlawful, under Interstate Commerce Act, § 1, where they are made up of the rates charged to the nearest competitive point through which the shipments pass, which are low rates forced by severe competition, combined with the local rates fixed by the state railroad commission, between such point and the point of destination.—*Interst. Com. Commission v. Western & A. R. Co.*, 93 Fed. 83, affg. s. c. 88 Fed. 186.

Where on one of two lines between the same points the rate was higher than on the other, but was subsequently reduced to the same figure, such action does not show the unreasonableness of the former higher rate.—*Marley v. Norfolk & W. R. Co.*, 11 Inters. Com. R. 616.

It does not necessarily follow that a rate is unreasonable because on the same or another road the same article is hauled a greater distance from a different point of origin, at the same or a less rate.—*Cannon v. Mobile & O. R. Co.*, 11 Inters. Com. R. 537.

An interstate rate higher than the sum of the local rates fixed by state commissions is not necessarily excessive, where the traffic is light and the financial condition of the road poor.—*Brabham v. Atlantic C. L. R. Co.*, 11 Inters. Com. R. 464.

A through interstate passenger fare higher than the sum of the local state fares is not necessarily unlawful; the sole question is of the reasonableness of such through rate.—*Artz v. Seaboard Air L. R. Co.*, 11 Inters. Com. R. 458.

A reasonable terminal charge for delivery of live stock at the yards in Chicago is \$1.—*Cattle Raisers' Assn. v. Mo. K. & T. R. Co.*, 11 Inters. Com. R. 296.

That a joint rate on hay from points of production to points of consumption through East St. Louis is less than the rate into that point added to the rate out, does not establish the illegality of any of the rates involved.—*St. Louis Hay & G. Co. v. Mobile & O. R. Co.*, 11 Inters. Com. R. 90.

Refrigeration charges held reasonable.—*Consolidated Forwarding Co. v. So. Pac. Co.*, 10 Inters. Com. R. 590.

Deserted warehouses and depreciated values along the line of a railroad do not necessarily show that rates in question are unjustifiable.—*Danville v. So. R. Co.*, 8 Inters. Com. R. 409.

The Interstate Commerce Commission will not necessarily reduce interstate rates to the sum of the state rates now in force by operation of state law.—*Savannah Bureau v. Charleston & S. R. Co.*, 7 Inters. Com. R. 601.

Where two routes exist between two points, the rate which may be lawfully charged is such a rate as is reasonable by the shorter and less expensive route.—*Newland v. No. Pac. R. Co.*, 6 Inters. Com. R. 131.

A local rate, which presumably is adopted as covering both initial and final expenses of the haul, is *prima facie* excessive as part of a through rate over a through line composed of two or more carriers.—*Board of Trade v. Ala. Mid. R. Co.*, 6 Inters. Com. R. 1.

That with prevailing prices and rates, a complainant cannot conduct his business at a profit, does not demonstrate such rates to be excessive.—*Buchannan v. No. Pac. R. Co.*, 3 Inters. Com. R. 655, 5 I. S. C. C. R. 7.

An increase of the trolley fare from five cents to ten cents between Watertown and Glen Park held unreasonable.—*Watertown Residents v. Black R. Traction Co.* Decided by the N. Y. Public Service Commission for the Second District, May 12, 1908.

Charges in excess of those fixed by legislative authority are conclusively unreasonable.—*Heiserman v. Burl. C. R. & N. R. Co.*, 63 Iowa, 732, 18 N. W. 902.

In the absence of special contract, the posted schedules fix the rates of a shipment.—*Kellerman v. K. C. St. J. & C. B. R. Co.*, 136 Mo. 177, 34 S. W. 41.

A state statute provided that no carrier should charge more for transportation than the rate appearing in the printed tariff.—*Held*, that from the fact that a greater charge is made for transportation in one direction between two points than is charged in the other direction between the same points, it does not necessarily follow that the former rate is an overcharge.—*Scully v. Atlantic C. L. R. Co.*, 144 N. C. 180, 56 S. E. 876.

A carrier is not entitled to charge as for separate parcels for a hamper containing such parcels, and a charge adjusted on that basis is unlawful.—*Pickford v. Grand J. R. Co.*, 10 M. & W. (Eng.) 399.

[38] — Statutory rates.

Maximum fare for transportation of passengers on railroads,—see N. Y. R. R. L., § 37.

Provisions as to rate of fare on street surface railroads,—see N. Y. R. R. L., § 101.

Whether an act fixing a maximum rate is a regulation of interstate commerce,—see ante, § 25, note [14].

As against the shipper, the carrier cannot recover for the transportation of property more than the maximum fixed by law, by showing that the amount sought to be charged is no more than a reasonable compensation for the services rendered. As between the company and a shipper, there is a statutory limitation of the charge for transportation actually performed.—*Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, affg. s. c. 36 Wis. 252.

The three cents per mile statutory maximum charge does not apply to street railway corporations.—*Hoyt v. Sixth Ave. R. Co.*, 1 Daly (N. Y.), 528.

A charge of more than the statutory maximum per mile is permissible on a spur track running from the main line to a race-track, and used only at racing times.—*Palm v. N. Y. N. H. & H. R. Co.*, 17 N. Y. Supp. 471.

An Illinois act gave a state board power to fix maximum rates, and made carriers liable to penalties for extortionate charges, on suit by shippers.—*Held*, that to sustain recovery it must be shown that the carriers charged more than the rates fixed by the commission, and until such rates are fixed there can be no liability, even though the proof shows the rates charged to be more than fair and reasonable.—*Chicago, B. & Q. R. Co. v. Illinois*, 77 Ill. 443.

If a carrier is entitled to charge three cents per mile and "the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance," the charge is properly the multiple of five next above the figure obtained by multiplying the rate by the distance.—*Heaton v. C. H. & D. R. Co.*, 1 Oh. N. P. 188, 2 Oh. Dec. 47.

[39] Advances in rates.

Advances in freight rates to be filed and published,—see post, § 29, note.

There is no presumption of wrong arising from a change of rate by a carrier—*Interstate Com. Commission v. Ch. G. W. R. Co.*, 209 U. S. 108, 28 Sup. Ct. (U. S.) 493, affg. s. c. 141 Fed. 1003.

That a certain class of express traffic has to be specially delivered, which involves a special terminal expense, does not warrant an increase in the rate more than the amount of the additional expense for the special service.—*Society Am. Florists v. U. S. Exp. Co.*, 12 Inters. Com. R. 138.

Advances in rates on live stock from the southwest in 1903 were unjust and unreasonable.—*Cattle Raisers' Assn. v. Mo. K. & T. R. Co.*, 11 Inters. Com. R. 296.

Large expenditures for reducing grades, adding to equipment, etc., do not justify advances in rates, as they are supposed to decrease the cost of transporting.—*Rates from St. L. to Texas Common Points*, 11 Inters. Com. R. 238.

Where material advances in reasonable and remunerative rates were made by concerted action of the carriers, justification for the increases must be clearly shown.—*Rates from St. L. to Texas Common Points*, 11 Inters. Com. R. 238.

Increased volume of traffic should reduce, not advance, rates.—*Rates from St. L. to Texas Common Points*, 11 Inters. Com. R. 238.

An advance in the price of the article transported does not justify an advance in the rates.—*Rates from St. L. to Texas Common Points*, 11 Inters. Com. R. 238; *Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

Carriers have no right to advance a rate which is already reasonably high and which yields an adequate return for the service rendered, solely because additional revenue is needed.—*Tift v. So. R. Co.*, 10 Inters. Com. R. 548.

An advance in rates cannot be claimed to be the outcome of competition, as the natural and immediate effect of competition is to lower, rather than advance, rates.—*Tift v. So. R. Co.*, 10 Inters. Com. R. 548.

When carriers advance a rate which has been in force for some time, the burden of proof is upon them to show sufficient grounds for such advance.—*Central Y. P. Assn. v. Ill. Cent. R. Co.*, 10 Inters. Com. R. 505.

A railroad will not be permitted to advance rates already remunerative, merely because competitive conditions have been so far restrained that it can.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

Railways should share in the general prosperity and recuperate losses of the past in an era of good times. But this does not necessarily mean that they are entitled to advance former rates, certainly not in those cases where the rate was not reduced owing to the financial depression.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

An increase in rates which results simply from the withdrawal of a lower export rate, or from the maintenance of any tariff rate, cannot be condemned solely for that reason as an unwarranted advance.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

Where by concerted action and under circumstances not warranting an increase, carriers have advanced rates, they cannot, when the lawfulness of the increase is questioned as to a single commodity, plead their need for more revenue.—*National Hay Assn. v. L. S. & M. S. R. Co.*, 9 Inters. Com. R. 264.

Carriers making an advance in rates should be able to present a satisfactory justification of such advance, particularly when the old rates have been of many years' standing, and the advance is great, and the traffic affected is of large volume and vital importance.—*Railroad Commission of Florida v. Savannah, F. & W. R. Co.*, 3 Inters. Com. R. 414, 688, 5 I. C. C. R. 13.

An increase of one-sixth in the charge for the same service, through the device of charging for the gross instead of the net weight, is unreasonable.—*Proctor v. C. H. & D. R. Co.*, 2 Inters. Com. R. 614, 3 Inters. Com. R. 131, 4 I. C. C. R. 87.

Where an existing classification and rate have not been shown to operate injuriously to the carrier, or to give undue advantage to shippers, a change that materially injures an important industry and a class of shippers at a particular point, who have there built up the industry in reliance upon the continuation of a previous classification and rate first established, and long maintained without complaint from any quarter, will be held unlawful by the Interstate Commerce Commission.—*Bates v. Pa. R. Co.*, 2 Inters. Com. R. 608, 732, 734, 714, 3 I. C. C. R. 435.

[40] What constitutes a reduction in rates.

The Constitution of California provided that "whenever a railroad shall * * * lower its rates * * * such reduced rates shall not be again raised or increased from such standard without the consent of the governmental authority in which shall be vested the power to regulate fares and freights." Limited passenger tickets were issued which did not give all the privileges of full fare tickets, but it was shown that these privileges were of little or no value to the average traveller over such line.—*Held*, that there was a reduction in rates within the meaning of the constitutional provision.—*Edson v. So. Pac. R. Co.*, 144 Cal. 182, 77 Pac. 894.

[41] Whether statements of agents as to rates bind carrier.

Shipper must be guided by published tariffs rather than statements of carriers' agents,—see post, § 33, note [9].

A carrier is bound by the acts of its depot agent in giving rates.—*Southern R. Co. v. Anniston, F. & M. Co.*, 135 Ala. 315, 33 So. 274.

The receipt of goods marked for a particular destination beyond the terminus of the receiving carrier's line, without an express undertaking to do more than transport to that terminus and deliver to a connecting carrier, does not make such initial carrier bound by the statement of its local station agent as to the rates to be charged over the connecting lines.—*McLagan v. Ch. & N. W. R. Co.*, 116 Iowa, 183, 89 N. W. 233.

[42] Refund of overcharge.

An overcharge made in good faith, through misapprehension or misunderstanding between the passenger and the agents, may lawfully and properly be corrected by a refund of the excess.—*Sanger v. So. Pac. R. Co.*, 2 Inters. Com. R. 548, 3 I. S. C. C. R. 134.

[43] Effect of long continuance of rates.

The existence of rates for a considerable period gives no right by prescription either to the carrier or shipper to their continuance.—*Quimby v. Clyde Ss. Co.*, 12 Inters. Com. R. 459.

[44] Extent of interest of shippers or public in rates.

Where the service of a common carrier between two points is rendered for just and reasonable rates, the public have no interest in the question whether one corporation or many are engaged in it, or whether it is under a monopoly control.—*Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, affg. s. c. 68 Hun (N. Y.), 486, 22 N. Y. Supp. 976.

The amount of the compensation or allowance which a carrier pays to an elevator owner for elevation is not a matter of concern either to shippers or to other carriers, unless in some way it enters into the rates charged on the grain traffic, and thus makes the rate excessive, or unless by some device a portion of the allowance is returned to the shippers and thus becomes a rebate.—*Allowances to Elevators by U. Pac. R. Co.*, 12 Inters. Com. R. 99.

[45] Carload and less than carload rates.

Power of Commission to prescribe minimum carload weights,—see post, § 49, note [14].

A distinction should be drawn between the legal obligation of carriers and the discretion that may properly exercise. It would be lawful for carriers to establish carload and less than carload rates on cotton, with a reasonable difference between them and a reasonable minimum which would secure to shippers the lower carload rates; but it does not follow that they are bound to do so, much less that they can be required to establish a differential based upon an unusual carload minimum, especially when such differential is sought to favor the use of a particular machine for compressing cotton.—*Planters' Compress Co. v. C. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 382.

A vendee, who has purchased carriages of different manufacturers to the amount of a carload, should be permitted to procure the carload rate thereon by having them brought together at the warehouse of some one of his vendors and by that vendor loaded into the car and shipped.—*Buckeye Buggy Co. v. C. C. C. & St. L. R. Co.*, 9 Inters. Com. R. 620.

[46] Prohibition of rates unreasonably low.

A provision that all rates shall be reasonable and just does not render rates unreasonably low unlawful to such an extent as to enable the Interstate Commerce Commission to prohibit their being made.—*In re Chicago, St. P. & K. C. R. Co.*, 2 Inters. Com. R. 55, 137, 2 I. C. C.; R. 231.

[47] Mandamus to compel issuance of ticket.

A person wrongfully refused a commutation ticket may compel its issuance by mandamus.—*State ex rel. Atwater v. D. L. & W. R. Co.*, 48 N. J. L. 55, 2 Atl. 803.

[48] Restraining unlawful charge.

A federal court may properly enjoin carriers from establishing, or increasing to, an unreasonable rate, at the same time leaving the matter in such shape that the Interstate Commerce Commission may ultimately determine whether the contemplated increase is just and reasonable.—*Kiser Co. v. Central of Ga. R. Co.*, 158 Fed. 193.

Although an action at law for damages to recover unreasonable rates which have been enacted in accordance with a schedule of rates as filed is forbidden by the Interstate Commerce Act, an injunction may be had to restrain the filing and enforcement of a schedule of unreasonable rates or a change to unjust and unreasonable rates.—*Kalispell L. Co. v. Gt. Northern R. Co.*, 157 Fed. 845.

A railroad duly filed and published a schedule of rates, which certain shippers alleged to be unlawful and unreasonable and a proceeding was being conducted by the Interstate Commerce Commission to determine as to the reasonableness of these rates.—*Held*, that a court could not grant an injunction to restrain the railroad from charging the schedule rates pending the decision of the Commission.—*Potlatch L. Co. v. Spokane Falls & N. R. Co.*, 157 Fed. 588.

A shipper, when notice is given that a carrier intends to put a rate into effect, which will be unjust or discriminatory, need not wait until the rate has gone into effect and then complain to the Interstate Commerce Commission, but may bring suit to restrain the exaction of the proposed rate.—*Jewett v. Ch. M. & St. P. R. Co.*, 156 Fed. 160.

A court, when it enjoins a proposed unlawful rate, does not make any rate but simply restrains the doing by the carrier of an unlawful act.—*Jewett v. Ch. M. & St. P. R. Co.*, 156 Fed. 160.

Where a controversy between parties relative to rates is pending before the Interstate Commerce Commission, and no irreparable injury seems threatened, a court of equity will not ordinarily, in advance of the action of the Commission, enjoin the charging of such rates.—*Tift v. So. R. Co.*, 123 Fed. 789.

A bill seeking injunction against extortionate charges must allege that there are some parties who are charged less for the same service than complainant, and that he has no other means of carrying on his business than those whereon he is overcharged.—*De Barry Baya Line v. Jacksonville R. Co.*, 40 Fed. 392.

An individual cannot sue to restrain a surface street railroad from charging a fare in excess of the rate permitted by law. The proper remedy is an action by the Attorney-General to annul the charter.—*McNulty v. Brooklyn Heights R. Co.*, 31 Misc. (N. Y.) 674, 66 N. Y. Supp. 57.

An injunction will not be granted to compel a carrier to transport goods at the rates fixed by law, but it will be granted to prevent a carrier from entering into an agreement not to transport goods at the rates fixed by law.—*Rogers L. & M. Works v. Erie R. Co.*, 20 N. J. Eq. 379.

The right to fix rates is a legislative function which the courts cannot exercise, but it is competent for the courts, certainly in the absence of legislative regulations, to protect the public against the exaction of oppressive and unreasonable charges and discrimination.—*Griffin v. Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240.

[49] What sum may reasonably be tendered in payment of fare on street cars.

A passenger on a street railroad is not bound to tender the exact fare, but must tender a reasonable sum, and the carrier must accept such tender and furnish change to a reasonable amount. Tender of five dollars for a five cent fare is not a reasonable sum.—*Barker v. Central Park R. Co.*, 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489n, affg. s. c. 3 Misc. (N. Y.) 635, 22 N. Y. Supp. 1132.

A tender of a five dollar gold piece for a five cent fare by a passenger who has no smaller change is a reasonable tender, obligating the street railway to furnish change and carry the passenger.—*Barrett v. Market St. R. Co.*, 81 Cal. 296, 22 Pac. 859, 6 L. R. A. 336.

[50] Contracts between competing roads as to fares.

An agreement between a railroad and its competitor that it will not reduce its fares within a specified time, unless required by law, is valid.—*Raritan R. Co. v. Middlesex & S. T. Co.*, 70 N. J. L. 732, 53 Atl. 332.

[51] Right of carrier to prepayment of charges.

Discrimination between connecting carriers in compelling prepayment of charges,—see post, § 35, note [6].

By accepting goods for carriage without requiring prepayment a carrier waives its right to payment of its charges in advance.—*Grand Rapids & I. R. Co. v. Diether*, 10 Ind. App. 206.

[52] Recovery of overcharge — Right.

Charges imposed pursuant to rules not published may be recovered,—see post, § 33, note [8].

Actions to recover for violations of long and short haul rule,—see post, § 36, notes [37]–[41].

Whether statutory remedies supplant existing remedies,—see post, § 40, note [2].

Where on the receipt of goods by a carrier, an exorbitant charge was stated, and the same was coercively exacted either in advance or at the completion of the service, an action could be maintained, at common law, to recover the overcharge.—*Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. R. (U. S.) 350, revg. s. c. 12 Tex. Ct. R. 498, 85 S. W. 1052.

Consistently with the provisions of the Interstate Commerce Act, a shipper cannot maintain a common law action in a state court for excessive and unreasonable charges on interstate shipments where the rates charged were those duly fixed by the carrier according to the Interstate Commerce Act and not found unreasonable by the Interstate Commerce Commission.—*Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. R. (U. S.) 350, revg. s. c. 12 Tex. Ct. R. 498, 85 S. W. 1052; *Texas & P. R. Co. v. Cisco Oil Mill Co.*, 204 U. S. 449.

When a carrier accepted goods without payment of the cost of carriage, or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained, at common law, to recover the excess over a reasonable charge.—*Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. R. (U. S.) 350, revg. s. c. 12 Tex. Ct. R. 498, 85 S. W. 1052.

Liability of a carrier to the shipper for excessive charges does not arise where the carrier has not charged more than the rate fixed by the commission or by statute.—*Winsor Coal Co. v. Ch. & A. R. Co.*, 52 Fed. 716.

A contract for shipment at less than the published rate is void, and no action lies under the Interstate Commerce Act for excessive charges by reason of the violation of such contract.—*Red Cloud M. Co. v. So. Pac. R. Co.*, 9 Inters. Com. R. 216.

Any charges imposed on the shipper in excess of those set forth in the rate schedules may be recovered by the shipper.—*Suffern, H. & Co. v. Ind. D. & W. R. Co.*, 7 Inters. Com. R. 255.

A common carrier is, at common law, subject to an action at law for damages in case of refusal to perform its duties to the public for a reasonable sum, or to recover back the money paid where the charge is excessive.—*Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, affg. s. c. 68 Hun (N. Y.), 486, 22 N. Y. Supp. 976.

If a carrier makes a reasonable advance in rates while a shipper is unsuccessfully trying to get cars, and the latter pays the increased rate,

he cannot recover the excess charge.—*Strough v. N. Y. C. & H. R. R. Co.*, 92 App. Div. (N. Y.) 584, 87 N. Y. Supp. 30; *affd.* 181 N. Y. 533, 73 N. E. 1133.

If a shipper voluntarily and without objection pays an increased freight rate, knowing that the railroad had not given ten days' notice of the change as required by the Interstate Commerce Act, he cannot recover the excess charge.—*Strough v. N. Y. C. & H. R. R. Co.*, 92 App. Div. (N. Y.) 584, 87 N. Y. Supp. 30; *affd.* 181 N. Y. 533, 73 N. E. 1133.

An action will lie against a carrier at common law by the shipper, for the recovery of excess charges—*Langdon v. N. Y., L. E. & W. R. R. Co.*, 58 Hun (N. Y.), 122, 11 N. Y. Supp. 514.

When a carrier refuses to transport property at a fair compensation, the shipper may have redress in an action for damages.—*People ex rel. Ohlen v. N. Y. L. E. & W. R. Co.*, 22 Hun (N. Y.), 533.

The person paying an excessive charge, at the demand of the carrier, has a common law right, independent of statute, to recover back the excess so paid, regardless whether it was paid under protest.—*Heiserman v. Burl. C. R. & N. R. Co.*, 63 Iowa, 732, 18 N. W. 903.

Where the schedules have not been posted as required by the Interstate Commerce Act, and the overcharge is consequently merely one in excess of the rate agreed on between the carrier and shipper, an action to recover the excess may be maintained in the state courts.—*Wabash R. Co. v. Sloop*, 200 Mo. 198, 98 S. W. 607.

A carrier may be compelled, in an action for money had and received, to repay an excess over the freight which may lawfully be charged.—*Paine & Co. v. Pa. R. Co.*, 7 Kulp (Pa.), 187.

If, after a state commission has fixed a through rate, a carrier still refuses to accept goods under it, whereby a shipper has to ship his goods at local rates to the connecting point, and then reship them, again at local rates, the carrier is liable for the excess cost of the shipment, and the statutory penalties.—*Inman v. St. L. & S. R. Co.*, 14 Tex. Civ. App. 39, 37 S. W. 37.

Excess charges paid may be recovered back in an action for money had and received.—*Great Western R. Co. v. Sutton, L. R.*, 4 H. L. (Eng.) 226.

[53] — Reparation through Interstate Commerce Commission.

A shipper seeking reparation predicated upon the unreasonableness of the rates established pursuant to the Interstate Commerce Act must primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of the schedule so established, because the rates fixed therein are unreasonable.—*Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. R. (U. S.) 350, *revq. s. c.* 12 Tex.

Ct. R. 498, 85 S. W. 1052; *Texas & P. R. Co. v. Cisco Oil M. Co.*, 204 U. S. 449, 27 Sup. Ct. R. (U. S.) 358.

There is no right of action either under the Federal Anti-trust Act or the Interstate Commerce Act for a readjustment of tariff rates filed and posted, other than through the Interstate Commerce Commission. A shipper cannot maintain an action at law for excessive and unreasonable freight rates exacted on interstate shipments when the rates charged were those which had been duly fixed by the carrier according to the Interstate Commerce Act and had not been found to be unreasonable by the Commission.—*American U. Coal Co. v. Pa. R. Co.*, 159 Fed. 278.

Reparation will not be allowed a shipper for a breach of a contract by the carrier to accord a privilege not offered to the general public in the published tariffs.—*Shiel v. Ill. Cent. R. Co.*, 12 Inters. Com. R. 242.

Where a shipper seeks to recover under Interst. Com. Act, § 8, damages sustained through enforced payment of excessive transportation charges, it is not necessary to have all the carriers, over whose route the goods were shipped, before the Interstate Commerce Commission to enable it to direct reparation, any carrier concerned being made by that section liable for the full amount of loss.—*Independent Ref. Assn. v. W. N. Y. & P. R. Co.*, 6 Inters. Com. R. 378.

In a proceeding under Interst. Com. Act, § 8, providing that any carrier subject to the provisions of the Act should be liable for the full amount of damages sustained in consequence of any violation of a provision of that Act, where damages resulting from an exaction of excessive charges are sought to be recovered, it is not material whether the claimants, who are the shippers, or the consignees paid the charges.—*Independent Ref. Assn. v. W. N. Y. & P. R. Co.*, 6 Inters. Com. R. 378.

In a proceeding under Interst. Com. Act, § 8, to recover the damages occasioned by the exaction of excessive charges, each carrier over whose route the goods were transported being severally liable for the entire amount, it is immaterial by which line the excessive charge was made, or how it was divided between the lines constituting the route.—*Independent Ref. Assn. v. W. N. Y. & P. R. Co.*, 6 Inters. Com. R. 378.

[54] — Burden of proof.

Where a shipper sues the initial carrier for excessive charges by the connecting carrier, the burden of proof is on the plaintiff to establish the authority of the local station agent of the defendant to bind his company.—*McLagan v. Ch. & N. W. R. Co.*, 116 Iowa, 183, 89 N. W. 233.

[55] — Evidence and findings.

A finding that carriers should discontinue charging a certain rate does not necessarily justify a money recovery by the shipper. Such

reparation can be based only on a finding that the rate was unreasonable at the time it was paid.—*Grain Shippers' Assn. v. Ill. Cent. R. Co.*, 8 Inters. Com. R. 158.

Charges in excess of those fixed by legislative authority are conclusively unreasonable, and in an action by shippers to recover excess, evidence to show the excess charges were in fact reasonable is immaterial.—*Heiserman v. Burl. C. R. & N. R. Co.*, 63 Iowa, 732, 18 N. W. 902.

In a suit against a carrier for unreasonable charges, it is necessary to show that such rates were higher than those fixed by the state commission.—*Cohn v. St. Louis, I. M. & S. R. Co.*, 181 Mo. 30, 79 S. W. 961.

[56] — Measure of damage.

The proper rule of reparation for excessive rates is the difference between the rate charged and the rate which should have been charged. Proof that the carriers' rates on strawberries were so excessive that complainant's crop was valueless to pick, etc., does not entitle complainant to even nominal damages in reparation for this loss as such.—*Perry v. Fla. C. & P. R. Co.*, 3 Inters. Com. R. 416, 740, 5 I. S. C. C. R. 97.

[57] — Limitation of action.

The statute of limitations on an action by a shipper under his common law right to recover excess charges, is not that provided by statute as to recovery of penalties, but that on actions on implied contracts.—*Heiserman v. Burl. C. R. & N. R. Co.*, 63 Iowa, 732, 18 N. W. 903. Cf. *Herriman v. R. Co.*, 57 Iowa, 187.

[58] Duty of street railroads as to giving of transfers.

Provisions requiring the issuing of transfers by street surface railroads,—see N. Y. R. R. L., § 104.

Power of Commission to regulate giving of transfers,—see post, § 49, note [14].

Section 104 of the N. Y. Railroad Law requires a street railroad company to issue transfers only to such lines as are operated by it under lease or other contract.—*O'Connor v. Brooklyn H. R. Co.*, 123 App. Div. (N. Y.) 784, 108 N. Y. Supp. 471.

Under the first provision of N. Y. R. R. L., § 101, a passenger on a street car is entitled for one fare to a "continuous ride" over the lines of a company and those operated or controlled by it on the same car, and without change.—*O'Connor v. Brooklyn H. R. Co.*, 123 App. Div. (N. Y.) 784, 108 N. Y. Supp. 471.

Under the second provision of N. Y. R. R. L., § 101, a passenger on a street car is entitled to transfer from the main line to any branch or extension or *vice versa*, or he may ride over such branch and main line for one fare if the same car continues over both, but he is not entitled to transfer to another line of the same company which crosses the main line at right angles and does not run into the main line, unless it can be shown that such intersecting line is operated by the other under a lease or contract, in which case a transfer could be demanded under N. Y. R. R. L., § 104.—*O'Connor v. Brooklyn Heights R. Co.*, 123 App. Div. (N. Y.) 784, 108 N. Y. Supp. 471.

The "point of intersection" where a passenger on a street car is entitled to transfer to a connecting line is any point where the passenger can continue his direct journey by taking another car.—*Charbonneau v. Nassau Elect. R. Co.*, 123 App. Div. (N. Y.) 531, 108 N. Y. Supp. 110.

The word "continuous," as used in N. Y. R. R. L., § 104, which gives a passenger on a street railway a right to one continuous passage over the connecting lines owned or operated by that company, must be construed to mean "direct" whenever it can apply and a "continuous passage" must mean the most direct, the quickest and most convenient route to the desired destination under the circumstances.—*Charbonneau v. Nassau Elect. R. Co.*, 123 App. Div. (N. Y.) 531, 108 N. Y. Supp. 110.

A person desiring to go from the corner of Lexington avenue and 102d street, New York city, to the corner of Columbus avenue and 93d street, took a north-bound car, was transferred west at 116th street, and it was then necessary that he go south on Columbus avenue. A transfer was refused on the ground that having begun his journey north, he could receive no transfer which would take him south.—*Held*, that he was entitled to his transfer as demanded.—*Wells v. N. Y. City R. Co.*, 122 App. Div. (N. Y.) 488, 107 N. Y. Supp. 430.

It is the duty of a street railroad corporation, by virtue of N. Y. R. R. L., § 101, to transport, for a single fare, a passenger whose fare is accepted on any car, to any point upon its line reached by cars running in that direction, whether or not the car boarded by the passenger is a short-service or a long-service car.—*Baron v. N. Y. City R. Co.*, 120 App. Div. (N. Y.) 134, 105 N. Y. Supp. 258.

When a passenger pays his fare on a car, the contract implied is that the company will carry the passenger from the point where he gets on the car to the nearest point possible to his destination by the shortest and most direct route, and the company will not be obliged to carry him by a longer and more circuitous route.—*Kelly v. N. Y. City R. Co.*, 119 App. Div. (N. Y.) 223, 104 N. Y. Supp. 561, *affd.* 192 N. Y. 97, 84 N. E. 569.

A passenger is not entitled to penalties because the conductor refused him transfers to enable him to make his trip by a roundabout route.—

Hunt v. Brooklyn H. R. Co., 115 App. Div. (N. Y.) 673, 101 N. Y. Supp. 209.

N. Y. R. R. L., § 104, vests authority in a street railroad to fix transfer points where the convenience of the greatest number of the traveling public will be subserved in going to and from their respective points of destination, and if this is done there is a compliance with the Act, even though under such system it refuses transfers at some points.—*Topham v. Interurban St. R. Co.*, 96 App. Div. (N. Y.) 323, 89 N. Y. Supp. 298, revg. s. c. 42 Misc. (N. Y.) 503, 86 N. Y. Supp. 295.

A transfer need not be to continue the passenger's journey in the same longitudinal direction.—*Kelley v. N. Y. City R. Co.*, 52 Misc. (N. Y.) 585, 102 N. Y. Supp. 742.

When a street railroad company voluntarily adopts the custom of issuing transfers for the consideration paid the conductor of the first car, it binds itself, by a contract, to transport the passenger from the point where he enters the car to a point on any line to which, under the custom of the company, it is usual to issue transfers. When the passenger pays his fare and demands the transfer, and it is issued, the contract is complete.—*Georgia R. & Elect. Co. v. Baker*, 125 Ga. 562, 54 S. E. 639.

Where a franchise to operate a street railway is given by an ordinance which also contains conditions as to the giving of transfers and the sale of tickets, and the company commences operations under such ordinance, the company assumes contractual obligations as to the conditions imposed by the same.—*Virginia Pass. & P. Co. v. Commonwealth*, 103 Va. 644, 49 S. E. 995.

[59] Transfer statutes — How construed generally.

General rules of statutory construction,—see ante, § 1, notes [23]–[39].

A transfer penalty statute should be construed adversely to the company and in favor of the right of the public to receive a transfer.—*O'Reilly v. Brooklyn Heights R. Co.*, 95 App. Div. (N. Y.) 253, 89 N. Y. Supp. 41; affd. 179 N. Y. 450, 72 N. E. 517.

N. Y. R. R. L., §§ 39, 104, which provide penalties for overcharge and the refusing of transfers respectively, must be considered together in determining the liability of a railroad for an excessive charge or refusal to give a transfer.—*Tullis v. Brooklyn Heights R. Co.*, 71 App. Div. (N. Y.) 494, 75 N. Y. Supp. 863.

[60] — Validity.

A municipal regulation forbidding the selling or giving away of street railway transfers is constitutional.—*City of Chicago v. Openheim*, 229 Ill. 313, 82 N. E. 294.

N. Y. R. R. L., § 104, providing that street railroad corporations entering into traffic agreements shall carry between points on the lines embraced in the contract for a single fare, and shall give transfers to any point on any road embraced in the agreement, is constitutional.—*Blume v. Interurban St. R. Co.*, 41 Misc. (N. Y.) 171, 83 N. Y. Supp. 989.

[61] — To what roads applicable.

N. Y. R. R. L., Art. IV, § 101, providing that no corporation constructing and operating a railroad under the provisions of that article shall charge more than five cents for a continuous ride from any point on its road or any line operated by it to any other point on its lines within the limits of an incorporated city or village has no application to transportation on a steam railroad which is leased by an electric surface railroad corporation.—*People v. Brooklyn Heights R. Co.*, 187 N. Y. 48, 79 N. E. 838.

The single five cent fare requirement of N. Y. R. R. L., § 101, does not apply to an elevated or steam surface road having a charter right to charge a greater fare, even though such road has been leased by a street railroad to which the section does apply and though the lessee has wholly substituted electricity for steam as motive power on the leased line.—*People v. Brooklyn Heights R. Co.*, 187 N. Y. 48, 79 N. E. 838.

N. Y. R. R. L., § 104, providing that every street railroad corporation entering into a contract for the use of the road of another company shall carry any passengers desiring to make a continuous trip between any two points on the railroads or portions thereof embraced within such contracts, for a single fare, does not apply to a case where there is a continuous trip over the road of one company and where there is no contract with other lines.—*Baron v. N. Y. City R. Co.*, 120 App. Div. (N. Y.) 134, 105 N. Y. Supp. 258.

Where two surface railroads are leased and operated by the same company, N. Y. R. R. L., § 104, requires that transfers shall be given between the two lines at points of their intersection.—*Griffin v. Interurban St. R. Co.*, 179 N. Y. 438, 72 N. E. 513, modfg. s. c. 96 App. Div. (N. Y.) 636, 89 N. Y. Supp. 1105, and *Scudder v. Interurban St. R. Co.*, 96 App. Div. (N. Y.) 340, 89 N. Y. Supp. 1115.

One who is refused a transfer from the line of a street railway which owns a majority of the stock of another street railway, to the lines of the latter, and is compelled to pay an additional fare, cannot recover a penalty under N. Y. R. R. L., § 39.—*Senior v. N. Y. City R. Co.*, 111 App. Div. (N. Y.) 39, 97 N. Y. Supp. 645; *affd.* 187 N. Y. 559, 80 N. E. 1120.

A steam railroad and an electric surface railroad were leased by a corporation and their tracks connected, the motive power of the former being changed to electricity, and they were operated as a continuous line.—*Held*, that N. Y. R. R. L., § 101, embodying the provisions of L. 1884, ch. 252, as amended, providing that no company should charge more than five cents for one continuous ride over lines operated by it, does not apply to this case, especially as the steam railroad was in operation prior to the passage of that act.—*Barnett v. Brooklyn Heights R. Co.*, 53 App. Div. (N. Y.) 432, 65 N. Y. Supp. 1068.

The requirement of N. Y. R. R. L., § 104, relating to contracts between street railroads and requiring issuance of transfers between railroads, "embraced in such contract," includes only roads operated by the contracting companies at the time the contract was made.—*Mendoza v. Metropolitan St. R. Co.*, 51 App. Div. (N. Y.) 430, 64 N. Y. Supp. 745, 48 App. Div. (N. Y.) 62, 62 N. Y. Supp. 580.

A street railway having two lines physically distinct, not intersecting, and not operated as a part of the same system, is not required, under N. Y. R. R. L., § 104, to grant transfers from one line to the other, at a point where the terminus of one line is about thirty feet from the other.—*Ketcham v. N. Y. City R. Co.*, 48 Misc. (N. Y.) 367, 95 N. Y. Supp. 553.

N. Y. R. R. L., § 101, incorporating the provisions of L. 1884, ch. 252, § 13, providing that no street surface railroad company incorporated under that Act shall charge more than five cents for a continuous ride from any point on its road "or on any road or line or branch operated by it or under its control," to any point on such line or its said connecting roads or branches within the limits of a city, does not apply to roads leased by such a corporation from a steam railroad company.—*McNulty v. Brooklyn Heights R. Co.*, 36 Misc. (N. Y.) 402, 73 N. Y. Supp. 698.

N. Y. R. R. L., § 104, requiring contracting corporations to carry passengers for one fare between any two points on said roads, refers only to corporations between whom there is a traffic agreement, and is not applicable to a corporation that has leased and is operating exclusively the line of another corporation.—*Roosa v. Brooklyn Heights R. Co.*, 28 Misc. (N. Y.) 387, 59 N. Y. Supp. 664.

[62] Demand for transfer — Rules as to time for making.

Passengers not bound by rules of which no reasonable notice has been given,—see ante, note [22].

A rule of a street railroad which requires passengers desiring transfers to obtain them from the conductor at the time of paying fare is not unreasonable.—*Ketchum v. N. Y. City R. Co.*, 118 App. Div. (N. Y.) 248, 103 N. Y. Supp. 486.

A rule of a street railroad company requiring a passenger to ask for a transfer at the time he pays his fare is reasonable.—*Fischer v. N. Y. City R. Co.*, 54 Misc. (N. Y.) 267, 104 N. Y. Supp. 400.

The rule of the company that a passenger shall demand a transfer only at the time of paying his fare is not a reasonable regulation, and does not relieve the company from statutory penalties for refusing a later demand.—*Levine v. Nassau Elec. R. Co.*, 50 Misc. (N. Y.) 552, 99 N. Y. Supp. 422.

[63] — Sufficiency.

Where, upon payment of his fare, a passenger immediately demanded a transfer, and upon no reply being made, the conductor apparently not hearing the request, the passenger, "less than a minute" thereafter again demanded a transfer, the demand complies with rule of the street railroad company providing that passengers must ask for transfers at the time of paying the fare.—*Wasserman v. N. Y. City R. Co.*, 104 N. Y. Supp. 398.

[64] Facts establishing refusal to issue transfer.

In an action to recover a penalty for refusal to give a transfer it appeared that the passenger asked for a transfer to Canal St., not stating in which direction she desired to go on that street, and received a transfer which was only good going east, while she desired to go west.—*Held*, that the evidence did not establish a refusal.—*Thistle v. N. Y. City R. Co.*, 54 Misc. (N. Y.) 268, 104 N. Y. Supp. 401.

The giving of a transfer which is not good is tantamount to a refusal to give a good transfer.—*Gasper v. N. Y. City R. Co.*, 51 Misc. (N. Y.) 39, 99 N. Y. Supp. 902.

"Refusal," under a statute imposing a penalty, implies that the party refusing has the ability to do the thing demanded of him, or if he has not the ability, the want of it must arise from his own negligence or want of proper attention to the business entrusted to him.—*Conley v. Sherman, S. & S. R. Co.*, 90 Tex. 295, 38 S. W. 519.

[65] Presumption that proper transfer will be issued.

A passenger who is entitled to and demands a certain transfer is justified in assuming that a proper transfer will be issued to him.—*Moon v. Interurban St. R. Co.*, 85 N. Y. Supp. 363.

[66] Issuance of improper transfer.

Considered as a refusal to issue,—see ante, note [64].

The conductor of a car on which a passenger presents a transfer and a reasonable explanation why his transfer does not on its face entitle

him to ride on that car, determines at the peril of himself and his company, whether to permit the passenger to continue his journey.—*Georgia R. & Elec. Co. v. Baker*, 125 Ga. 562, 54 S. E. 639.

A clause in a transfer that "the holder, by accepting, agrees that, should any controversy arise as to its validity, holder will pay fare and call at company's office for correction," is unreasonable and void.—*Georgia R. & Elect. Co. v. Baker*, 125 Ga. 562, 54 S. E. 639.

[67] Time limit on use of transfers.

A ten minute limitation on the use of a transfer, where the holder cannot find accommodations in a car within that time, is arbitrary and illegal.—*Jenkins v. Brooklyn Heights R. Co.*, 29 App. Div. (N. Y.) 8, 51 N. Y. Supp. 216.

A street railroad may reasonably limit the time within which its transfers may be used.—*Muckle v. Rochester R. Co.*, 79 Hun (N. Y.), 32, 29 N. Y. Supp. 732.

A requirement that a street railway transfer shall be valid only if used within fifteen minutes is not invalid in the absence of any statutory provision.—*Heffron v. Detroit City R. Co.*, 92 Mich. 406, 52 N. W. 802, 16 L. A. R. 345.

[68] Each refusal a separate offense.

N. Y. Stock Corp. L., § 53, imposed a penalty for any refusal of the president and secretary of a corporation to exhibit its stock book to a stockholder when requested to do so. A stockholder, upon successive days, demanded an inspection of the books and was refused.—*Held*, that he wanted the book for but one occasion and only one penalty was incurred.—*Cox v. Paul*, 175 N. Y. 328, 67 N. E. 586.

The statutory penalty may be recovered for each refusal to give transfers.—*Lux v. N. Y. City R. Co.*, 45 Misc. (N. Y.) 222, 92 N. Y. Supp. 109.

Under a statute providing that any railroad which should refuse to issue a mileage book would be liable to a penalty, several demands by one person and refusals by the railroad give only one cause of action against the railroad.—*Watson v. N. Y. O. & W. R. R. Co.*, 24 Misc. (N. Y.) 628, 54 N. Y. Supp. 201.

Under the North Carolina statute prescribing penalties for refusing to transport cattle, each day's refusal to transport one head of cattle is a separate offense.—*Carter v. Wilmington & W. R. Co.*, 126 N. C. 437, 36 S. E. 14.

[69] Recovery of more than one penalty in a single action.

Penalties inuring to benefit of state,—see post, §§ 56, 58, notes.

But one penalty for refusals to give transfers can be recovered in the same action, and the bringing of the action must be deemed a waiver of

all previously incurred penalties.—*Griffin v. Interurban St. R. Co.*, 179 N. Y. 438, 72 N. E. 513, modfg. s. c. 96 App. Div. (N. Y.) 636, 89 N. Y. Supp. 1105, and *Scudder v. Interurban St. R. Co.*, 96 App. Div. (N. Y.) 340, 89 N. Y. Supp. 1115.

A sound public policy requires that only one penalty should be recovered in a single action, and that the institution of an action for a penalty should be regarded as a waiver of all previous penalties incurred.—*Griffin v. Interurban St. R. Co.*, 179 N. Y. 438, 72 N. E. 513, modfg. s. c. 96 App. Div. (N. Y.) 636, 89 N. Y. Supp. 1105, 96 App. Div. (N. Y.) 340, 89 N. Y. Supp. 1115.

If cumulative recovery of penalties is to be permitted, the legislature should state its intention in so many words.—*Griffin v. Interurban St. R. Co.*, 179 N. Y. 438, 72 N. E. 513, modfg. s. c. 96 App. Div. (N. Y.) 636, 89 N. Y. Supp. 1105, 96 App. Div. (N. Y.) 340, 89 N. Y. Supp. 1115.

A party suing for penalties can recover for but one violation or default occurring prior to the commencement of the action—*Cox v. Paul*, 175 N. Y. 328, 67 N. E. 586.

Under a toll road regulation statute, penalties may be recovered, by the person aggrieved, for each offense.—*Suydam v. Smith*, 52 N. Y. 383.

Under the N. Y. Act of 1857 to prevent extortion in railway charges, only one penalty of \$50 can be recovered, together with the excess paid, for all overcharges prior to the beginning of suit.—*Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 644.

Cumulative penalties cannot be recovered in one action for failure to issue transfers in violation of N. Y. R. R. L., § 104.—*McLean v. Interurban St. R. Co.* (No. 2), 102 App. Div. (N. Y.) 18, 92 N. Y. Supp. 77, modfg. s. c. 87 N. Y. Supp. 135.

N. Y. R. R. L., § 104, providing that for every refusal to comply with the requirements of that section as to the giving of transfers, the corporation so refusing shall forfeit \$50 to the aggrieved party, permits the recovery of cumulative penalties in one action.—*Topham v. Interurban St. R. Co.*, 96 App. Div. (N. Y.) 323, 89 N. Y. Supp. 298, revg. s. c. 42 Misc. (N. Y.) 503, 86 N. Y. Supp. 295; disapproved 106 App. Div. (N. Y.) 1, 94 N. Y. Supp. 653

Only one penalty for refusal to give a transfer can be recovered in one action, and the bringing of an action waives all right to recover penalties accruing theretofore.—*In re Transfer Penalty Cases*, 46 Misc. (N. Y.) 579, 92 N. Y. Supp. 322.

As many penalties for excessive charges as have been incurred before the bringing of suit, can be recovered in the one action.—*Johnson v. Hudson R. R. Co.*, 2 Sweeney (N. Y.), 298; revd. on other points, 49 N. Y. 455.

Only one penalty for failure to give a transfer can be recovered in a single action, and the institution of an action for a penalty is to be regarded as a waiver of all previous penalties incurred.—*Harkow v. N. Y. City R. Co.*, 121 App. Div. (N. Y.) 194, 105 N. Y. Supp. 689.

Only one statutory penalty for an omission of duty by a common carrier can be recovered up to the bringing of suit.—*Parks v. Nashville, C. & St. L. R. Co.*, 81 Tenn. 1, 49 Am. Rep. 655.

[70] Good faith of passenger as affecting right to penalty.

A recovery of penalties and excess fare can be had when the plaintiff was riding only to obtain the penalty.—*Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 644.

Where it appears that a passenger who was refused a transfer rode to the transfer point with the sole object of finding out what would be done and had no business beyond the point at which the transfer would be honored, he is not entitled to recover the statutory penalty.—*Bull v. N. Y. City R. Co.*, 121 App. Div. (N. Y.) 582, 106 N. Y. Supp. 378.

Where, in an action to recover a penalty for the refusal of a street railroad company to give a transfer, it appears that the sole purpose of the plaintiff in asking for a transfer was to bring an action to recover the penalty in case of its refusal, there can be no recovery.—*Nicholson v. N. Y. City R. Co.*, No. 4, 118 App. Div. (N. Y.) 858, 103 N. Y. Supp. 695; *McCarthy v. N. Y. City R. Co.*, 55 Misc. (N. Y.) 208, 105 N. Y. Supp. 1128; *Johnston v. N. Y. City R. Co.*, 54 Misc. (N. Y.) 642, 104 N. Y. Supp. 812.

One demanding a transfer for a continuous trip, with no desire to take such a trip but only to ascertain if the transfer would be given, is not a passenger under N. Y. R. R. L., § 104.—*Myers v. Brooklyn Heights R. Co.*, 10 App. Div. (N. Y.) 335, 41 N. Y. Supp. 798.

That a passenger was riding for the purpose of collecting the penalties for refusing to give transfers does not destroy the statutory right of action.—*Fitzmartin v. N. Y. City R. Co.*, 51 Misc. (N. Y.) 36, 99 N. Y. Supp. 765.

A person riding on a street car for the purpose of recovering penalties for refusals to issue transfers may recover the statutory penalty.—*McLean v. Interurban St. R. Co.*, 87 N. Y. Supp. 135; modfd. 102 App. Div. (N. Y.) 18, 92 N. Y. Supp. 77.

One who goes on a train for the sole purpose of paying an excessive charge, if one is demanded, and then suing for the statutory penalty, may nevertheless recover.—*Missouri Pac. R. Co. v. Smith*, 60 Ark. 221, 29 S. W. 752.

Under a statute of Arkansas providing that a person who is charged an excessive fare may recover a penalty from the carrier, a

passenger so injured may recover a penalty for each overcharge, although he went upon the train solely for the purpose of accumulating penalties against the railroad.—*St. Louis & S. F. R. Co. v. Gill*, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452n; *affd.* on other points, 156 U. S. 649, 15 Sup. Ct. R. (U. S.) 484

[71] Matters in defense.

The company may raise the question of the reasonableness of rates fixed by the state, as a defense to an action for the recovery of penalties for violating the directions of the statute.—*St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. R. (U. S.) 484, *affg.* s. c. 54 Ark. 101, 15 S. W. 18.

A common carrier cannot excuse itself from compliance with the Safety Appliance Act by showing that the particular equipment is out of repair.—*U. S. v. Gt. Northern R. Co.*, 150 Fed. 229.

In an action for violating the statute as to use of automatic couplers, it is not a defense that the defendant used reasonable care and diligence in keeping such coupling apparatus on its cars in repair.—*U. S. v. So. R. Co.*, 135 Fed. 122.

The "mistake" relieving a railroad corporation from the penalty for overcharge, under N. Y. R. R. L., § 39, may be one of law as well as of fact, and where there is shown to have been a mistake by the corporation in the construction of its statutory rights, a mistake not the result of carelessness in being advised as to such rights, it is exempt from the penalty.—*Goodspeed v. Ithaca St. R. Co.*, 184 N. Y. 351, *affg.* s. c. 88 App. Div. (N. Y.) 147, 84 N. Y. Supp. 383.

In an action to recover the penalty provided for by N. Y. R. R. L., § 104, for the refusal of a street railroad company to give a transfer, it is no defense that the defendant had provided for transfers and had given its conductors transfer tickets to give to passengers.—*Snee v. Brooklyn Heights R. Co.*, 120 App. Div. (N. Y.) 570, 104 N. Y. Supp. 907.

That the conductor did not have any transfers left will not absolve the street railway company from liability.—*Rosenberg v. Brooklyn Heights R. Co.*, 91 App. Div. (N. Y.) 580, 86 N. Y. Supp. 871.

If a conductor refuses to accept a transfer and compels payment of another fare, but later offers to refund the money and accept the transfer, the company may plead such facts as a defense to an action for the statutory penalties, to show that such overcharge was inadvertently and mistakenly made.—*Tullis v. Brooklyn Heights R. Co.*, 71 App. Div. (N. Y.) 494, 75 N. Y. Supp. 863.

A penalty cannot be recovered by a passenger who has failed to receive a transfer through the misjudgment, neglect, mistake or inadvertence of the conductor, or through the latter's belief that the pas-

senger was not entitled thereto for failure to comply with the company's rule requiring demands for transfers to be made at the time of paying fare, if it appears that the company had established a system of transfers between the lines in question, and had furnished its conductors with transfer slips.—*Schwartzman v. Brooklyn Heights R. Co.*, 50 Misc. (N. Y.) 116, 98 N. Y. Supp. 941.

It is not a defense to an action for the statutory penalty, that the giving of transfers at the point in question might cause undue crowding in the street and at the intersections.—*Muskowitz v. Brooklyn Heights R. Co.*, 47 Misc. (N. Y.) 119, 93 N. Y. Supp. 385.

The mistake of a conductor in demanding an additional fare after a transfer to a "car ahead," does not permit the recovery of a penalty.—*Stewart v. Metropolitan R. Co.*, 20 Misc. (N. Y.) 605, 46 N. Y. Supp. 414.

A mistake as to distance by carrier's agent is not a defense in an action for the statutory penalty for overcharge.—*Missouri Pac. R. Co. v. Smith*, 60 Ark. 221, 29 S. W. 752.

A champertous agreement between a passenger and his attorney is not a bar to recovery of a statutory penalty.—*Missouri Pac. R. Co. v. Smith*, 60 Ark. 221, 29 S. W. 752.

A voluntary payment of an overcharge does not preclude a recovery of the statutory penalty.—*St. Louis & S. F. R. Co. v. Gill*, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452n; *affd.* on other points, 156 U. S. 649, 15 Sup. Ct. R. (U. S.) 484.

A railroad company is not liable for penalties for an overcharge, merely because of the act of a conductor, in nowise authorized or approved by the company.—*Hall v. Norfolk & W. R. Co.*, 44 W. Va. 36, 26 S. E. 754, 41 L. R. A. 669.

[72] Actions for penalties.

Public action to recover penalties,—see post, § 59, note.

Actions to recover penalties are not to be enlarged beyond the express terms of the statute upon which they are founded.—*Cox v. Paul*, 175 N. Y. 328, 67 N. E. 586.

In statutes giving a penalty, if there be reasonable doubt of the case made upon the trial or in the pleadings coming within the statute, the party of whom the penalty is claimed is to have the benefit of such doubt.—*Chase v. N. Y. C. R. Co.*, 26 N. Y. 523.

No penalty can be recovered under N. Y. R. R. L., § 39, which provides for the recovery of a penalty from carriers asking or receiving more than the lawful fare, for the refusal of a street railroad company to issue a transfer in violation of section 104 of that Act.—*O'Connor v. Brooklyn H. R. Co.*, 123 App. Div. (N. Y.) 784, 108 N. Y. Supp. 471.

The statute of limitations on an action under N. Y. R. R. L., § 104, is three years, and is not that prescribed by § 39 of that Act.—*Munro v. Brooklyn Heights R. Co.*, 120 App. Div. (N. Y.) 516, 125 N. Y. Supp. 325.

A suit by an infant passenger to recover the statutory penalties for refusal of a transfer should be brought in his own name, and not that of his father or guardian *ad litem*.—*Fox v. Interurban St. R. Co.*, 42 Misc. (N. Y.) 538, 86 N. Y. Supp. 64.

The New York courts will not enforce the penalties prescribed in a Pennsylvania statute prohibiting unjust discriminations—*Langdon v. N. Y., L. E. & W. R. Co.*, 58 Hun (N. Y.), 122, 11 N. Y. Supp. 514, affg. 9 N. Y. Supp. 245.

Verdict for plaintiff reversed in transfer penalty case, where it was not proved that plaintiff took the proper car.—*Weinstein v. Interurban St. R. Co.*, 86 N. Y. Supp. 731.

"Forfeitures" under a transportation act are criminal rather than remedial, and hence actions to recover them are governed by the statute of limitations as to penalties.—*Herriman v. Burl. C. R. & N. R. Co.*, 57 Iowa, 187, 9 N. W. 378, 10 N. W. 340.

A private relator cannot use the name of the state in an action to enforce the statutory penalties against a railroad for failing to file a report as required by law.—*State ex rel. Hodge v. Marietta & N. G. R. Co.*, 108 N. C. 24, 12 S. E. 1041.

An action to recover a penalty under the Corporation Commission Act is an action *ex contractu*.—*Katzenstein v. Raleigh & G. R. Co.*, 84 N. C. 688.

Where the amounts found as penalties and the amounts found as damages are separately stated, and each penalty is separately stated, if some of the penalties are improper, they will be stricken out by the appellate court without vitiating the entire verdict.—*San Antonio & A. P. R. Co. v. Stribling*, 14 Tex. Ct. R. 38, 89 S. W. 963, modfg. s. c. 12 Tex. Ct. R. 200, 86 S. W. 374

[73] Effect of repeal of penal statute.

When the legislature repeals a penal statute, unless there is some saving clause, all penalties fall, even if given to individuals and suit has been brought and is pending for them.—*Welch v. Wadsworth*, 30 Conn. 149.

[74] Right to recover damages as affected by right to penalty.

A passenger on a Vanderbilt avenue car in Brooklyn received a transfer entitling him to transfer to the Seventh avenue line "at intersection of issuing line." Said lines intersect at the corner of 20th street and

9th avenue, but the rule of the street railway company made another intersecting point a considerable distance away the transfer point. It was much nearer for the passenger to transfer at the first-named point, but having done so the transfer was refused and he was ejected from the car.—*Held*, that the transfer, on its face, entitled the passenger to transfer at the first-named point and he was entitled to recover damages for the ejectment.—*Charbonneau v. Nassau Elect. R. Co.*, 123 App. Div. (N. Y.) 531, 108 N. Y. Supp. 110.

Where a passenger received a transfer so punched that the time limit had already expired, and the conductor, when his attention was called to the fact, said that it was all right, the passenger is not entitled to recover damages for his ejection from the car upon which he presented the transfer although he might recover the excess fare exacted of him or the statutory penalty for refusal to give a transfer.—*Nicholson v. Brooklyn Heights R. Co.*, 118 App. Div. (N. Y.) 13, 103 N. Y. Supp. 310.

A passenger expelled because his transfer-slip is improperly refused, is entitled to substantial damages.—*Georgia R. & Elec. Co. v. Baker*, 125 Ga. 562, 54 S. E. 639; *Laird v. Pittsburg T. Co.*, 166 Pa. 4, 31 Atl. 51.

A statute making a carrier liable for penalties to the state for overcharges, etc., does not take away the right of a shipper to recover the excess paid by him, above the legal rates.—*Fuller v. Ch. & N. W. R. Co.*, 31 Iowa, 187; *affd.* 17 Wall. (U. S.) 560.

§ 27. Switch and sidetrack connections; powers of commissions *[to order their installation or discontinuance].—1. A railroad corporation, upon the application of any shipper tendering traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection or connections with a lateral line of railroad or private sidetrack owned, operated or controlled by such shipper, and shall, upon the application of any shipper, provide upon its own property a sidetrack and switch connection with its line of railroad, whenever such sidetrack and switch connection is reasonably practicable, can be put in with safety and the business therefor is sufficient to justify the same.

2. If any railroad corporation shall fail to install or operate any such switch connection with a lateral line of railroad or any such sidetrack and switch connection as aforesaid, after written applica-

* Words in brackets are not a part of section heading as enacted.—Ed.

tion therefor has been made to it, any corporation or person interested may present the facts to the commission having jurisdiction by written petition, and the commission shall investigate the matters stated in such petition, and give such hearing thereon as it may deem necessary or proper. If the commission be of opinion that it is safe and practicable to have a connection, substantially as prayed for, established or maintained, and that the business to be done thereon justifies the construction and maintenance thereof, it shall make an order directing the construction and establishment thereof, specifying the reasonable compensation to be paid for the construction, establishment and maintenance thereof, and may in like manner upon the application of the railroad corporation order the discontinuance of such switch connection.

Parallel provisions of Interstate Commerce Act,—see Interst. Com. Act, § 1.

Provisions as to places where freight and passengers shall be received and discharged,—see N. Y. Rap. Tr. Act, § 28, post, Appendix A.

Publication of charges for switching service, etc.,—see post, § 28.

Power of Commission to make regulations for the switching of freight cars,—see post, § 37.

Preferences in furnishing cars to shippers on sidetracks,—see post, § 37.

Power of Commission to order repairs or changes in any switches or terminal facilities used by carrier,—see post, § 50.

Forfeitures and penalties,—see post, § 56.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Purpose of acts regulating railroads,—see ante, § 1, note [32].

What constitutes a railroad or street railroad,—see ante, § 2, note [8].

Effect, review and restraint of orders,—see ante, § 23, notes.

[1] Duty to furnish switch connections.

General duty of carrier to render switching services,—see ante, § 26, note [9].

General duty of carriers not to discriminate as to facilities and service, —see post, § 32, note [1].

Discriminations in furnishing sidetrack connections generally,—see also post, § 32, note [28].

A carrier is under no legal obligation to construct a spur track from its line to a coal mine for the private benefit of the owner in shipping his product, although it has permitted to be built, and has contracted to build, similar tracks to other mines.—*Harp v. Choctaw, O. & G. R. Co.*, 118 Fed. 169; *affd.* 125 Fed. 445.

A common carrier of interstate freight cannot lawfully deny switch connections and service to one person, place, locality or kind of traffic which it affords to others similarly situated.—*Interstate Stock-yards Co. v. Indianapolis U. R. Co.*, 99 Fed. 472.

The fact that the expense to the defendant railroad company in connection with the transportation of the complainant's coal from sidetracks would be greater than the expense connected with the carriage of coal from the mines of other parties who now enjoy sidetrack connections, does not in any way excuse the withholding of such facilities from the complainant, but is merely a matter to be considered by the defendant in establishing the rates for the transportation of the commodities in question.—*Red Rock F. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 438.

That a railroad has not sufficient equipment to supply the requirements of all its patrons does not excuse an otherwise unlawful discrimination as to switch connections.—*Red Rock F. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 438.

A railroad company is liable in damages if it discriminates against a particular grain elevator in the matter of switching and terminal facilities.—*Kellogg v. Sowerby*, 93 App. Div. (N. Y.) 124, 87 N. Y. Supp. 413.

[2] Right of shipper to demand sidetrack connections.

The owner of a coal mining property adjoining the right of way of a railroad is entitled as a matter of right to connect switch tracks built on his own land with the track of such road, to facilitate the loading and shipping of coal.—*Olanda Coal M. Co. v. Beach Creek R. Co.*, 144 Fed. 150.

The establishment and maintenance of switch connections by a railroad does not, at common law, create any duty on the part of that company to forever maintain the same.—*Jones v. Newport N. & M. V. Co.*, 65 Fed. 736.

Not every person or company desiring to develop a coal mine along or near a railroad is entitled to demand a sidetrack connection merely because connections have previously been made with other mines. There must be such similarity of situation and feasibility of connection as will permit practical adherence to reasonable operating conditions by the carrier.—*Red Rock F. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 438.

[3] Public control.

General power to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Whether an order requiring the delivery of cars on a siding imposes a burden on interstate commerce,—see ante, § 25, note [15].

An order of the North Carolina Corporation Commission requiring a railroad to deliver cars from another state to the consignee on a private siding beyond its own right of way, is void. Whether such an order would be valid, if applied only to state business, not decided.—*McNeill v. So. R. Co.*, 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722.

A state may require all coal carrying roads therein to make switch connections with all mines within its borders.—*Red Rock F. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 438.

The Interstate Commerce Commission has no direct power to order a carrier to put in sidetrack connections, or to prescribe the terms of their construction.—*Red Rock F. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 438.

[4] Conditions to furnishing sidetrack facilities.

A carrier cannot, as a condition to installing a sidetrack, require the shipper to sign an agreement that the siding shall never be used for carrying on coal business.—*Barden v. Lehigh V. R. Co.*, 12 Inters. Com. R. 222.

The refusal of a carrier to switch cars to plaintiff's side track without advance payment of demurrage charges is unlawful, even where plaintiff had refused to pay such charges on cars previously delivered to him without prepayment.—*Macloon v. Ch. & N. W. R. Co.*, 3 Inters. Com. R. 452, 711, 5 I. C. C. R. 84.

In contracting to install a side track for a shipper, a railroad may exempt itself from liability for loss from fire resulting from its own negligence, inasmuch as in installing such switch it is not acting as a common carrier, but may make such terms as the parties can agree upon.—*Mann v. Pere Marquette R. Co.*, 135 Mich. 210, 97 N. W. 721.

While a railway may impose reasonable conditions upon persons asking trackage for warehouses for the transportation of grain, they must be the same for all, and are a proper subject of investigation by the state commission.—*Farwell F. W. Assn. v. Minneapolis, St. P. & S. Ste. M. R. Co.*, 55 Minn. 8, 56 N. W. 248.

[5] Matters to be considered in determining whether switch connections will be ordered.

Inasmuch as sidings are frequently, if not generally, located within the corporate limits of cities or towns, in determining whether or not

such a connection will be ordered, the Interstate Commerce Commission must respect and give full consideration to the power and authority of the municipal officers, as well as the rights of the owners of adjoining and neighboring property.—*Barden v. Lehigh V. R. Co.*, 12 Inters. Com. R. 222.

If a switch connection is within the power of a state commission to order, it may take into account the benefit to both interstate and state traffic in determining the necessity therefor.—*Jacobson v. Wisconsin, M. & P. R. Co.*, 71 Minn. 514, 74 N. W. 893.

[6] Objections to installing of switches.

The Corporation Commission of North Carolina, in pursuance to powers delegated to it, ordered the establishment of a switch of certain length.—*Held*, that the fact that the installing of such a switch would increase the hazard of operating the road, is not a sufficient objection.—*North Carolina Corp. Commission v. Seaboard Air L. R. Co.*, 140 N. C. 239, 52 S. E. 941.

[7] Refusal to install may constitute undue prejudice.

Denial of switch connections may constitute undue prejudice.—*Red Rock F. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 438.

[8] Remedy of shipper.

Where a carrier permits a mine owner to build a side track connecting the mine with the main tracks, and continues for eight years to furnish cars to haul coal from the mine over its line, such side track must be considered a part of its line and if it disconnects such side track, mandamus will lie to compel its restoration.—*Chicago & A. R. Co. v. Suffern*, 129 Ill. 274, 21 N. E. 824.

If switching service be wrongfully stopped as to a shipper, he may have mandamus for its restoration, although he might have a remedy from the railroad commissioners.—*Larrabee Flour Mills Co. v. Mo. Pac. R. Co.*, 74 Kan. 808, 88 Pac. 72.

[9] Discontinuance of switches.

When a carrier erects a public side-track at which it receives and delivers goods for transportation, it in a sense makes to the public an open promise to receive goods there, and the carrier must give notice before discontinuing the same.—*Durden v. So. R. Co.*, — Ga. —, 58 S. E. 299.

[10] Switches as part of railroad.

Connecting a spur track with and making it a part of a railroad system, and devoting it to the purposes of traffic, makes it no longer a

private track, but subject to regulation by the state commission.—*State v. Willmar & S. F. R. Co.*, 88 Minn. 448, 93 N. W. 112.

[11] Permit to construct a switch in a public street.

In permitting a street railway corporation to lay and maintain in a public street a proposed switch to connect its lines with an express company's warehouse, to enable the latter company to use the former's lines, a city does not appropriate the street to a private use.—*Dulaney v. United R. & Elec. Co.*, 104 Md. 423, 65 Atl. 45.

[12] Rights of public in sidetrack.

Sidetracks from a railroad to granite yards near by are not mere private ways; the public has a beneficial use in such tracks.—*Barre R. Co. v. Montpelier & W. R. Co.*, 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785n.

[13] Receiving and delivering property at private switches.

Discriminations in receiving and delivering livestock on switches,—see post, § 32, note [26].

Duty of carriers to furnish cars on sidings,—see post, § 37, note [4].

A common carrier cannot be required to receive freight on or along a private switch, but its duty in that regard is confined to its own depots and shipping or receiving points.—*Bedford-Bowling Green S. Co. v. Oman*, 134 Fed. 441; *affd.* 134 Fed. 64.

Persons who have no property rights in a private switch over another's land cannot compel the latter to permit the railroad to receive and ship their freight over the switch to the railroad's own track.—*Bedford-Bowling Green S. Co. v. Oman*, 134 Fed. 441; *affd.* 134 Fed. 64.

The Atchison, T. & S. F. R. Co., at its Chicago depot, had no facilities for the loading and unloading of cattle, but it maintained a track connecting with the tracks of the Union Stock Yards & Transit Co., and it was customary to deliver cattle consigned to Chicago at the said stock yards. The railroad published and charged in addition to its regular Chicago rate, a terminal charge on shipments delivered at the Union Stock Yards. The complainant, who had for many years engaged in buying, selling and shipping live stock at the Union Stock Yards, insisted that inasmuch as the railroad provided no facilities for the unloading and handling of cattle at its depot, the delivery station at the stock yards must be deemed the railroad's Chicago station, and that goods consigned to Chicago must be delivered there without the additional terminal charge.—*Held*, that this contention was untenable.—*Walker v. Keenan*, 73 Fed. 755, *revg. s. c.* 64 Fed. 992; *distinguishing Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. R. (U. S.) 461.

[14] Switching charges.

Facts showing discrimination in switching charges,—see post, § 31, note [66].

An extra charge of \$2.00 per car in addition to the published rates cannot be justified by a statute providing that a railroad may charge a shipper the actual cost of maintaining and operating a sidetrack, it appearing that the charge was made without reference to the actual cost of maintenance and operation.—*Ohio Coal Co. v. Whitcomb*, 123 Fed. 359; certiorari denied, 191 U. S. 567, 24 Sup. Ct. R. (U. S.) 841.

It is a serious question whether, when property has been put in a car with the intent of shipping it outside of the state, it has not already commenced its interstate journey, so that regulation of switching charges for it is an interference with interstate commerce.—*Chicago, St. P. M. & O. R. Co. v. Becker*, 35 Fed. 866, 1 L. R. A. 744n.

The switching of cars by carrier is a local service. The charge for it is not a part of the through rate but purely a terminal charge, and may be regulated by a state commission.—*Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. 849.

§ 28. Tariff schedules; publication; *[powers of commissions as to form of schedules].—Every common carrier shall file with the commission having jurisdiction and shall print and keep open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property within the state between each point upon its route and all other points thereon; and between each point upon its route and all points upon every route leased, operated or controlled by it; and between each point on its route or upon any route leased, operated or controlled by it and all points upon the route of any other common carrier, whenever a through route and joint rate shall have been established or ordered between any two such points. If no joint rate over a through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid shall plainly state the places between which property and passengers will be carried, and shall also contain the classification of passengers, freight or property in force, and shall also state separately all terminal charges, storage charges,

* Words in brackets are not a part of section heading as enacted.—Ed.

icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and any rules or regulations which may in any wise change, affect or determine any part, or the aggregate of, such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedules shall be plainly printed in large type; copies thereof for the use of the public shall be kept posted in two public and conspicuous places in every depot, station and office of every common carrier where passengers or property are received for transportation, in such manner as to be readily accessible to and conveniently inspected by the public. The form of every such schedule shall be prescribed by the commission and shall conform as nearly as possible to the form of schedule required by the interstate commerce commission under the act of Congress, entitled: "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended by act approved June twenty-ninth, nineteen hundred and six, and other amendments thereto. Where any similar schedule is required by law to be filed with both commissions they shall agree upon an identical form for such schedule. The commission shall have power, from time to time, in its discretion, to determine and prescribe by order such changes in the form of such schedules as may be found expedient.

Court proceedings to compel compliance with published interstate tariffs,—see Elkins Act, § 3.

For parallel provisions of Interstate Commerce Act,—see Interst. Com. Act, § 6.

Rates fixed in published schedules shall be charged,—see ante, § 26, post, § 33.

Notice required for changes in published schedules,—see post, § 29.

Filing of evidence of concurrence of the various carriers in a joint tariff,—see post, § 30.

False classification prohibited,—see post, § 34.

Duty of carrier to afford facilities for interchange of traffic between connecting lines,—see post, § 35.

Power of Commission to regulate terminal, demurrage, icing, and storage charges.—see post, §§ 37, 49.

Power of Commission to establish through routes and joint rates,—see post, § 49.

Forfeitures and penalties for failure to file and publish schedules as provided,—see post, § 56.

General power to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

Power of the state to regulate the mode of operation of railroads,—see ante, § 1, note [2].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Purpose of acts regulating railroads,—see ante, § 1, note [32].

Who are common carriers,—see ante, § 2, notes [2]–[7].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Fixing a classification does not amount to fixing a rate,—see post, § 49, note [27].

[1] Power of state to require posting of schedules.

Legislative control over joint tariffs,—see post, note [26].

Power of Commission over tariff schedules,—see post, § 49, note [23].

A state may require the posting of tariff schedules, the same to be subject to the approval of its state railroad commission.—*Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607.

[2] Duty to file and publish.

Meaning of term “rate,”—see ante, § 26, note [26].

Duty to publish joint rates,—see post, note [27].

Effect of failure to properly post tariff schedules,—see post, § 33, note [7].

Filing and publication of passenger excursion rates,—see post, § 33, note [21].

Each railroad should print, post and file a tariff showing its own rates.—*Pitts v. St. L. & S. F. R. Co.*, 10 Inters. Com. 684.

When rates established to apply between points within a single state are applied as part of combination rates on transportation through different states, they, as well as the interstate rates, with which they are combined, must be published at stations and filed with the Interstate Commerce Commission.—*Export Rates from Points E. & W. of Miss. River*, 8 Inters. Com. R. 185.

A railroad must file, publish, and charge the published schedule of its rates for transportation from the United States into Canada.—*In re Investigation of Grand Trunk R. Co.*, 2 Inters. Com. R. 496, 3 I. C. C. R. 89.

Schedules of rates on freight for export must be posted in the same manner as on that which is not for export.—*New Orleans Cotton Exch. v. L. N. O. & T. R. Co.*, 2 Inters. Com. R. 461, 3 Inters. Com. R. 523, 4 I. C. C. R. 694.

[3] Schedule-making power not legislative.

Authorizing common carriers to establish rates which, when published and filed, shall be binding on the shipper, does not confer legislative power on the carrier.—*U. S. v. Standard Oil Co.*, 155 Fed. 305.

[4] Purpose of requirements as to posting and publishing schedules.

The posting of schedules in the carrier's depot is not a condition precedent to the establishment of rates, but a provision for assisting the public in ascertaining the rates in force.—*Texas & P. R. Co. v. Cisco Oil Mill Co.*, 204 U. S. 449, 27 Sup. Ct. R. (U. S.) 358; *U. S. v. Howell*, 56 Fed. 21.

The requirement of publication is imposed in order that the man having freight to ship may ascertain by an inspection of the schedules exactly what will be the cost to him of the transportation of his property; and not only that, but the law also gives him another and very valuable right, namely, the right to know, by an inspection of the same schedule exactly what will be the cost to his competitor of the transportation of his competitor's property.—*U. S. v. Ch. & A. R. Co.*, 148 Fed. 646.

The object of the provisions of the Interstate Commerce Act relating to the construction and publicity of tariff schedules is not merely to acquaint shippers and passengers with the scale of charges which may be lawfully imposed, but also to inform the officers intrusted with the duty of administering the law, to the end that complaints of injustice and exaction may be more intelligently considered, and relative reasonableness in transportation charges more effectually secured.—*Freight Bureau v. C. N. O. & T. P. R. Co.*, 6 Inters. Com. R. 195.

[5] Power of commission to excuse non-compliance with statute.

The Interstate Commerce Commission has no power, were it so disposed, to vary or excuse non-compliance with the requirements of the Interstate Commerce Commission Act as to filing, posting etc., of schedules.—*Rea v. Mobile & O. R. Co.*, 7 Inters. Com. R. 43.

[6] Method of making schedules and classifications.

The correct method of making up a tariff sheet is undoubtedly "a straight rate to every point on the line, and duly shown on the tariff sheets."—*Johnson v. Ch. M. & St. P. R. Co.*, 9 Inters. Com. R. 221.

The carriers should devise the methods of bringing their schedules into conformity with the law, without detailed suggestions from the Interstate Commerce Commission.—*In re Tariffs of Columbus & W. R. Co.*, 1 I. C. C. R. 626.

The Interstate Commerce Commission prefers to let the carriers work out the details of their schedules and classifications.—*Martin v. So. Pac. R. Co.*, 1 Inters. Com. R. 596, 2 Inters. Com. R. 1, 2 I. C. C. R. 1.

[7] Form of schedules.

Form of classification sheet,—see post, note [36].

Tariffs should be so simplified that persons of ordinary comprehension can understand them.—*Pitts v. St. L. & S. F. R. Co.*, 10 Inters. Com. R. 684.

Discussion as to form and contents of tariff schedules.—*Matter of the Form and Contents of Rate Schedules*, 6 Inters. Com. R. 267.

Unless the law or an order of the commission fixes what sizes of type tariff schedules shall be printed in, the court cannot by mandamus require use of a particular size.—*State v. Pensacola & A. R. Co.*, 27 Fla. 403, 9 So. 89.

[8] What constitutes "separate statement."

"State separately" does not authorize the issuance of separate circulars, but means that the transportation charges and any rules, regulations, etc., shall be separately stated on the schedules.—*Suffern, H. & Co. v. Ind. D. & W. R. Co.*, 7 Inters. Com. R. 255.

Rules or regulations, promulgated by the carrier in circulars separate from its rate sheets, are not lawfully in force.—*Suffern, H. & Co. v. Ind. D. & W. R. Co.*, 7 Inters. Com. R. 255.

[9] Classification and tariff together constitute schedule.

Connecting carriers filed with the Interstate Commerce Commission an "Official Classification" and a "Joint East-Bound Interstate Tariff." The former provided a certain rate for goods shipped subject to the "Uniform Bill of Lading" conditions and provided for a higher rate when not shipped subject to those conditions.—*Held*, that the classification and tariff were to be read together, and together constituted the schedule of rates.—*Mannheim Ins. Co. v. Erie & W. Transp. Co.*, 72 Minn. 357, 75 N. W. 602.

[10] Publication of export tariffs.

The through rates on export traffic cannot usually be determined and published pursuant to the Interstate Commerce Act, § 6, owing to the fluctuation in ocean rates. Under the circumstances, if the inland carrier publishes and maintains its division of the through rates, apparently it has done all it can be required to do under the Act. If the inland rail carriers, instead of receiving a fixed inland division, make through rates in fact, of which their division fluctuates, a ques-

tion arises as to the publication of such rates, not here passed upon.—*Kemble v. Boston & A. R. Co.*, 8 Inters. Com. R. 110, distinguishing *N. Y. N. H. & H. R. Co. v. Platt*, 7 Inters. Com. R. 323, overruling *N. Y. Board of T. & T. v. Pa. R. Co.*, 3 Inters. Com. R. 417, 4 I. C. C. R. 447, to conform to *Texas & P. R. Co. v. Inters. Com. Commission*, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666, revg. 57 Fed. 948, affg. 52 Fed. 187, 5 Inters. Com. R. 405.

Inland joint tariffs for foreign merchandise should be posted in the offices of the carrier at the port of entry and at the place of destination.—*New York Board of Trade v. Pa. R. Co.*, 2 Inters. Com. R. 660, 734, 755, 800, 4 I. C. C. R. 447.

In making and publishing export tariffs, the rate to the seaboard should be specified, and should not ordinarily be less than the inland tariff rate.—*N. Y. Prod. Exch. v. N. Y. C. & H. R. R. Co.*, 2 Inters. Com. R. 13, 28, 553, 3 I. C. C. R. 137.

[11] What constitutes sufficient posting and publication.

A notation in the tariff of one carrier making reference to the tariff of some competing carrier, a tariff which may not be accessible to prospective shippers, does not meet the requirements of the Interstate Commerce Act that the rate charged shall be published and posted.—*Pitts v. St. L. & S. F. R. Co.*, 10 Inters. Com. R. 684.

The provisions of Interstate Commerce Act, § 6, relative to publication of tariffs, are not complied with by posting a notice stating that tariffs may be inspected upon application to the carrier's agent.—*Paxton Tie Co. v. Detroit S. R. Co.*, 10 Inters. Com. R. 422.

The posting of a notice on the wall of a station stating where tariff sheets may be found, is not a sufficient compliance with the terms of the Interstate Commerce Act.—*Johnson v. Ch. M. & St. P. R. Co.*, 9 Inters. Com. R. 221.

Publication in a printed circular but not on the rate sheets, of rules or practices which affect the aggregate charges, is not a sufficient compliance with the Interstate Commerce Act.—*Spillers v. L. & N. R. Co.*, 8 Inters. Com. R. 364.

Putting up notices in the station that schedules are on file with the agent and may be examined on application, is not a sufficient compliance with the Interstate Commerce Act, even though done in good faith and with intent to comply with the statute, and even though no injury nor inconvenience appears to have resulted to the complainant, or the public.—*Rea v. Mobile & O. R. Co.*, 7 Inters. Com. R. 43.

Nailing up by one corner in a conspicuous place in the station, of an eleven page pamphlet containing the tariffs, rules, classifications,

etc., is not a sufficient "posting and keeping posted," nor is the binding of the pamphlets and schedules together and placing them on a conspicuous shelf on the agent's desk.—*State v. Pensacola & A. R. Co.*, 27 Fla. 403, 9 So. 89.

Furnishing schedules to agents, with instructions to post, does not fulfill the duty of the company, which is to "post and keep posted" such schedules.—*State v. Pensacola & A. R. Co.*, 27 Fla. 403, 9 So. 89.

The requirement of the Interstate Commerce Act as to posting, etc., of schedules is not met by placing the schedules in the possession of the station agent and posting a notice that he has them and that they can be inspected on application.—*Wabash R. Co. v. Sloop*, 200 Mo. 198, 98 S. W. 607.

[12] Excuses for failure to keep schedules posted.

That tariff sheets are defaced and torn from the walls does not excuse failure to keep them posted.—*Johnson v. Ch. M. & St. P. R. Co.*, 9 Inters. Com. R. 221.

That after posting, schedules in defendant's station were torn down, is no excuse.—*Griffin v. Wabash R. Co.*, 115 Mo. App. 549, 91 S. W. 1015.

[13] Published rates the standard of reasonableness.

Schedules established, filed and kept posted by the carrier, pursuant to the Interstate Commerce Act, are the sole standard by which courts and juries may judge of the reasonableness of a rate complained of, in an action under the act for damages by unreasonable rates.—*Van Patten v. Ch. M. & St. P. R. Co.*, 81 Fed. 545.

[14] Presumption of legality of rates filed and posted.

That circulars containing regulations, etc., separate from the rate sheets, have been filed with the Interstate Commerce Commission and not objected to, creates no presumption of the lawfulness of the regulations or the mode of publishing them.—*Suffern, H. & Co. v. Ind. D. & W. R. Co.*, 7 Inters. Com. R. 255.

Filing and posting schedules creates no presumption of their legality, even though the rates set forth therein are not challenged at the time.—*San Bernardino Bd. of Trade v. A. T. & S. F. R. Co.*, 2 Inters. Com. R. 522, 3 Inters. Com. R. 138, 4 I. C. C. R. 104.

The legal rates on a railroad are those posted in its depots.—*Locke v. Concord R. Co.*, 60 N. H. 552.

[15] Effect of tariffs.

Published rates must be charged,—see post, § 33, notes [1]–[3].

Tariffs can be given no retroactive effect.—*Through Routes and Through Rates*, 12 Inters. Com. R. 190.

[16] What constitutes notice to shipper of rules for shipment.

A pamphlet hanging in a railroad office, containing and purporting to contain rules and regulations for shipment of freight, is not constructive notice of its contents to a shipper.—*Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870.

[17] Contents of schedules — In general.

Filing and publication of passenger excursion rates,—see post, § 33, note [21].

Rates which are required to be filed and published cover not merely the carriage of the goods but services rendered in receiving and delivering property as well.—*Phelps v. Tex. & P. R. Co.*, 6 Inters. Com. R. 36.

Schedules should contain all the rates and classifications, so that the shipper need not apply to have a rate quoted to him.—*In re The Tariffs of the Transcontinental Lines*, 2 Inters. Com. R. 203, 2 I. C. C. R. 324.

A company cannot be required by mandamus, to state in the posted schedule the rate per mile or the distances between stations, in the absence of statute or order of the commission requiring it.—*State v. Pensacola & A. R. Co.*, 27 Fla. 403, 9 So. 89.

[18] — Rules and regulations.

See, also, post, n. [21].

Right of carrier to change or modify regulations,—see post, § 29, note.

Rates and regulations as to depot storage must be published.—*Blackman v. So. R. Co.*, 10 Inters. Com. R. 352.

All a carrier's regulations as to the transportation, etc., of private cars should be published in the rate schedules.—*Carr v. No. Pac. R. Co.*, 9 Inters. Com. R. 1.

The schedules filed and posted should state, among other terminal charges, the rules and regulations of the carrier as to storage, demurrage, etc.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

In a separate circular, defendant instructed its agents to disregard the regular published tariff rates to certain points and to use combination rates, whenever the latter were lower.—*Held*, that this practice was unlawful, for such rule should have been duly published on the tariff schedules.—*Spillers v. L. & N. R. Co.*, 8 Inters. Com. R. 364.

Any rules or regulations which "in any wise change, affect or determine any part or the aggregate of such rates," must be stated upon

the schedules, and issuance of separate circulars containing such rules is not sufficient.—*Suffern, H. & Co. v. Ind. D. & W. R. Co.*, 7 Inters. Com. R. 255.

Carriers should publish and enforce each and every one of their rules and regulations as to storage of freight, reconsignment of freight, diversion of cars to shippers' use, distribution of freight in part lots, and all similar concessions or privileges.—*American Warehouseman's Assn. v. Ill. Cent. R. Co.*, 7 Inters. Com. R. 556.

Rules and regulations which would affect the aggregate rate must be made known to the public in the same manner as other changes in schedules.—*Suffern, H. & Co. v. Ind. D. & W. R. Co.*, 7 Inters. Com. R. 255.

[19] — Charges for refrigeration.

By separately stating transportation and icing charges, carriers may make reasonable charges for both services.—*Knudsen-Ferguson Co. v. Mich. Cent. R. Co.*, 148 Fed. 968.

It is the duty of the carrier to file, publish, and observe, its icing charges.—*Matter of Charges for Transportation of Fruit*, 11 Inters. Com. R. 129.

Where carriers compel shippers to pay icing charges or do without necessary refrigeration for their traffic, they make these charges a part of the shipper's cost of transportation and subject to regulation under the Interstate Commerce Act.—*Consolidated Forwarding Co. v. So. Pac. Co.*, 10 Inters. Com. R. 590.

Charges for refrigeration should be published and strictly adhered to exactly as are all other charges for services in transportation.—*Re Transportation, etc., of Fruit*, 10 Inters. Com. R. 360.

[20] — Classifications of freight.

See, also, ante, n. [17].

Under the Illinois statute making it the duty of the Railroad and Warehouse Commission to prepare and publish a schedule of rates and fares, a classification of freight, made by the Commission in connection with the schedule of rates, is a part of the schedule.—*St. Louis & C. R. Co. v. Blackwood*, 14 Ill. App. 503.

[21] — Special services and privileges.

See, also, ante, n. [18].

The fact that a railroad gives free cartage of property from its station to the places of residence or business of shippers at Grand Rapids without stating such circumstances in the tariff schedules, is not a violation of Interst. Com. Act, § 6, relative to the filing and publishing of schedules.—*Interst. Com. Commission v. Detroit, G. H. & M. R. Co.*, 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986, revg. s. c. 57 Fed. 1005, affg. s. c., 74 Fed. 803.

The transferability of a passenger ticket is a privilege or facility affecting the value of the service, and any regulation affecting the same must be announced in the published schedules.—*Baltimore & O. R. Co. v. Hamburg*, 155 Fed. 849.

A privilege of stopping hogs in transit for sorting and reconsignment under the through rate from the point of origin must be set forth in the tariff sheets, else it cannot be enforced in favor of any particular shipper or shipping point.—*Shiel v. Ill. Cent. R. Co.*, 12 Inters. Com. R. 242.

If stop-over privileges are permitted for any purpose or on any basis, all the facts and circumstances connected therewith should be clearly stated in the published tariff, so the public generally may enjoy their benefits.—*Matter of Rates & Practices of M. & O. R. Co.*, 9 Inters. Com. R. 373.

Permitting cotton to be stopped off for grading and compressing, under a contract of through shipment and the practice of "floating cotton," is a privilege which is a part of the service covered by the rate, and should be specified in the published schedules.—*Unlawful Rates in Transp. Cotton by K. C. M. & B. R. Co.*, 8 Inters. Com. R. 121.

[22] — Basis of rates fixed.

The published tariffs should clearly set forth whether the standard for the crates used in the shipment of vegetables, etc., be one of weight or dimensions.—*Re Alleged Unlawful Charges by Savannah, F. & W. R. Co.*, 8 Inters. Com. R. 585.

[23] — Only legitimate charges to be included.

The law does not contemplate that a rate shall be made by including charges which the carrier does not in fact meet; and a tariff or schedule of transportation rates does not conform to the law which makes the rate charged depend on one or more factors which do not enter into the transportation as it is actually conducted.—*Pacific Coast Assn. v. So. Pac. Co.*, 12 Inters. Com. R. 364.

[24] Power of commissions as to matters to be included in schedules.

Should the Interstate Commerce Commission direct, by general order, that railway companies should thereafter regard cartage, when furnished free, as one of the terminal charges, and include it as such in their schedules, such an order might be regarded as a reasonable exercise of the Commission's powers.—*Interst. Com. Commission v. Detroit, G. H. & M. R. Co.*, 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986, revg. s. c. 57 Fed 1005, affg. s. c. 74 Fed. 803.

[25] Effect of failure to publish regulations.

Effect of failure to file and post notices of advances in rates,—see post, § 29, note.

If a carrier does not, in its schedules filed pursuant to Interst. Com. Act, § 6, announce that passenger tickets sold by it are not transferable, a proviso of non-transferability contained in any such ticket is unlawful and void.—*Baltimore & O. R. Co. v. Hamburger*, 155 Fed. 849.

[26] Legislative control over joint tariffs.

Where two or more roads have established a joint tariff, such tariff is as much within the control of the legislature as that of a single line.—*Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. R. (U. S.) 900, affg. s. c. 80 Minn. 191, 83 N. W. 60.

[27] Publication of joint rates.

What constitute through or joint rates,—see post, § 30, note [2].

Joint tariffs must show what carriers unite in making them,—see post, § 30, note [5].

Filing of statement showing concurrence in joint tariff,—see post, § 30, note [9].

Under Interst. Com. Act, § 6, and the orders of the Interstate Commerce Commission of July 21, 1887, it is not necessary for either of the connecting lines to publish their joint tariff at a non-competing point, or to volunteer information of such tariff to shippers.—*Chicago & N. W. R. Co. v. Osborne*, 52 Fed. 912, revg. 48 Fed. 49; certiorari denied, 146 U. S. 354, 13 Sup. Ct. R. (U. S.) 281.

Carriers arranging for a through route and also for a joint rate must give notice to the world of such arrangement, but carriers forming through routes without joint rates need file and publish only "the separately established rates, fares, and charges applied to the through transportation."—*Through Routes and Through Rates*, 12 Inters. Com. R. 190.

Combination rates which are filed and published as single rates from the point of shipment to destination, are governed by the provisions of the Interstate Commerce Act as to the filing of through rates.—*Gustin v. A., T. & S. F. R. Co.*, 8 Inters. Com. R. 277.

Joint tariffs need not be duplicated by each company uniting in making them, if a written statement is filed by each company that such tariffs are filed with its approval and authority.—*In re Joint Tariffs and Schedules*, 1 Inters. Com. R. 76, 1 I. C. C. R. 225.

[28] Reservation in schedule of right to route goods.

An initial carrier, in publishing its joint through rates, may reserve in its notice the right to route the goods beyond its own lines.—*Southern Pac. R. Co. v. Interst. Com. Commission*, 200 U. S. 536, 26 Sup. Ct. R. (U. S.) 330, revg. s. c. 132 Fed. 829.

The Southern Pacific and other railroads published a guaranteed through rate on citrus fruit from California to the Atlantic. The shippers routed the goods from the termini of the initial carrier and illegally procured rebates from the connecting carriers. To prevent this, the initial carriers republished the rate and reserved the right to route the goods beyond their own terminals. The Interstate Commerce Commission held this arrangement illegal, as subjecting the shipper to an undue advantage. The Circuit Court sustained the Commission on the ground that the routing by the carrier amounted to a pooling of freights.—*Held*, that this was error. Since the purpose of the Interstate Commerce Act is to facilitate commerce and prevent discrimination, it will not be interpreted to make illegal a salutary plan of preventing rebates.—*Southern Pac. R. Co. v. Interst. Com. Commission*, 200 U. S. 536, 26 Sup. Ct. R. (U. S.) 330, revg. s. c. 132 Fed. 829.

[29] What rates carrier may publish in absence of agreement for through route.

In the absence of some agreement or understanding with a connecting line by which a joint tariff is authorized, a carrier cannot lawfully publish or apply any other rates than those which it fixes for transportation between points reached by it.—*New York, N. H. & H. R. Co. v. Platt*, 7 Inters. Com. R. 323.

[30] Supervision of commission over classifications.

Power of Commission over classifications,—see post, § 49, note [20].

The Interstate Commerce Commission will refrain from interfering with efforts for a uniform classification of freight.—*McMillan v. Western Class. Committee*, 3 Inters. Com. R. 282, 4 I. C. C. R. 276.

[31] Classifications do not necessarily do exact justice.

There never can be certainty of exact justice in a question of classification and rate, and classification in its nature must be a compromise.—*Proctor v. C. H. & D. R. Co.*, 2 Inters. Com. R. 614, 3 Inters. Com. R. 131, 374, 4 I. C. C. R. 87; distinguished, 9 Inters. Com. R. 440.

[32] Determination of proper classifications — Objects.

Classification to be published in schedule,—see ante, note [20].

In making up the classification of freight, the object should be to make the rates bear upon all with relative equality.—*Pyle v. E. Tenn., W. & G. R. Co.*, 1 Inters. Com. R. 600, 767, 1 I. C. C. R. 465.

[33] — Method in general.

Classification must be based on a real distinction from a transportation viewpoint, and the Interstate Commerce Commission cannot regard a classification as scientific or a difference in rates as well based, which is altogether founded on a distinction that has no transportation significance.—*Stowe-Fuller Co. v. Pa. Co.*, 12 Inters. Com. R. 253.

The carrier need not undertake to make classification so minute as to conform to the differing varieties and conditions of traffic. To separate different grades or densities of the same article into different classes with varying rates, even if it could be accomplished, would go far to defeat the real purpose of classification.—*Planters' Compress Co. v. C. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 382; *affd.* and applied, *Planters' Compress Co. v. Mo. K. & T. R. Co.*, 11 Inters. Com. R. 606.

While there are exceptional instances requiring deviation from the principles and methods generally employed in classification of freight, it is manifest that to require the separation and grading into different classes with varying rates the different grades of the same articles of freight would greatly complicate the matter and would go far to defeat the very purpose of classification. Even then it would be impracticable to apportion with mathematical exactness the burdens of transportation. The best that is obtainable in this direction is reasonable and substantial approximation.—*Derr Mfg. Co. v. Pa. R. Co.*, 9 Inters. Com. R. 646.

Questions of classification should be determined on the principles which govern the proper division of articles of freight into classes, and not on the basis of the profits or other financial operations of the carrier.—*Proctor v. C. H. & D. R. Co.*, 9 Inters. Com. R. 440, distinguishing *Proctor v. C. H. & D. R. Co.*, 3 Inters. Com. R. 131, 4 I. C. C. R. 87.

Even where valid reasons exist for increased revenues for the carrier, it is the legal duty of the carrier to so classify traffic and adjust charges that the burdens of transportation shall be reasonably and justly distributed among the articles it carries.—*National Hay Assn. v. L. S. & M. S. R. Co.*, 9 Inters. Com. R. 264.

In a classification such as the Official, which contains but six general classes, it is manifestly impossible to bring together in each class only such articles as resemble each other in the elements of character, use value, volume, bulk, weight, risk and expense of handling, which have so often been referred to as governing conditions in freight classification. Competition also is often an important factor; not only competition between carriers, but also that of a commodity produced in one section with the same commodity produced in another section, and sometimes the competition of one kind of traffic with another. Necessarily many articles must appear together in a class which bear little relation to each other in

all of these respects; the best that can be done under such a scheme of classification is to place two or more articles possessing general similarity in the same class, and where an article is not analogous to any other, to put that article in the class containing commodities which are most nearly related to it in general character and other essential respects.—*National Hay Assn. v. L. S. & M. S. R. Co.*, 9 Inters. Com. R. 264.

In determining what freight rates shall be borne by different commodities an attempt should be made to obtain a fair relation between those commodities, and a classification which utterly ignores all considerations of this kind or which utterly fails to give due weight to such considerations, is unjust and unreasonable.—*Myer v. C. C. C. & St. L. R. Co.*, 9 Inters. Com. R. 78.

Carriers may not classify freight with sole regard to their own interests, but must respect the interests of shippers and consumers, and conform to the principles of equality and fair dealing which the Interstate Commerce Act lays down.—*Thurber v. N. Y. C. & H. R. R. Co.*, 1 Inters. Com. R. 397, 684, 2 Inters. Com. R. 742, 3 I. C. C. R. 473.

A railroad may not raise the classification of railroad ties in order to keep them on its lines or to keep the price low for its own interests.—*Reynolds v. N. Y. & P. R. Co.*, 1 Inters. Com. R. 600, 685, 1 I. C. C. R. 393.

[34] — Matters which may be considered.

Long existence of classification as evidence of reasonableness,—see post, § 49, note [27].

The condition and value of the property may properly be taken into account in determining the classification.—*National M. & W. Co. v. P. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 581.

The value of the service to the shipper has always been regarded as a prominent factor in classification and entitled to due recognition in the rates applied to different articles and to different grades and conditions of the same article.—*Planters' Compress Co. v. C. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 382; *affd. and applied, Planters' Compress Co. v. Mo. K. & T. R. Co.*, 11 Inters. Com. R. 606.

A lower classification and rate on some of a given grade of coal cannot be justified on the ground that it is for "railroad supply."—*Capitol C. & Co. v. Central Vt. R. Co.*, 11 Inters. Com. R. 104.

The elements of bulk, weight, value and character are main considerations in determining approximately what freight articles are so analogous as to entitle them to the same classification.—*Page v. D. L. & W. R. Co.*, 6 Inters. Com. R. 548.

It is a conceded rule of classification that value, on account of the enhanced risk and ability to pay a greater proportion of the aggregate re-

turn upon investment, may justify a higher classification.—*Schumacher Co. v. Ch. R. I. & P. R. Co.*, 6 Inters. Com. R. 61.

Comparison with the classification accorded analogous articles by carriers is the proper method of determining classification.—*Brownell v. Columbus & C. M. R. Co.*, 4 Inters. Com. R. 285, 5 I. C. C. R. 638.

The volume of traffic furnished by an article of transportation may be considered in classifying it.—*Warner v. N. Y. C. & H. R. R. Co.*, 3 Inters. Com. R. 74, 4 I. C. C. R. 32.

The market value of goods and the shippers representations to the public as to their character may be taken into account in classifying them.—*Warner v. N. Y. C. & H. R. R. Co.*, 3 Inters. Com. R. 74, 4 I. C. C. R. 32.

Carriers may make commodity class rates and special class rates to meet special conditions along their lines.—*New York Board of Trade v. Pa. R. Co.*, 2 Inters. Com. R. 660, 734, 755, 800, 4 I. C. C. R. 447.

Mere quantity, not measured by a recognized unit of quantity adapted to carriage and lessening the expense of handling or carriage, cannot be allowed to affect rates or classifications.—*Harvard Co. v. Pa. R. Co.*, 2 Inters. Com. R. 625, 3 Inters. Com. R. 257, 4 I. C. C. R. 212.

Comparisons with other articles, not necessarily competitive, are most helpful in determining the reasonableness of classification.—*Harvard Co. v. Pa. R. Co.*, 2 Inters. Com. R. 625, 3 Inters. Com. R. 257, 4 I. C. C. R. 212.

A different classification and rate for carload and less than carload lots is reasonable.—*Thurber v. N. Y. C. & H. R. R. Co.*, 1 Inters. Com. R. 397, 684, 2 Inters. Com. R. 742, 3 I. C. C. R. 473.

The proper classification of a commodity is to be judged relatively by the classification of other articles similar in character, quality and conditions of transportation.—*Myers v. Pa. Co.*, 2 Inters. Com. R. 151, 218, 403, 2 I. C. C. R. 573.

[35] Classification of specific articles.

Changes in classification,— see post, § 29, note.

Cotton waste is entitled to a lower rate than cotton goods.—*River-side Mills v. So. R. Co.*, 12 Inters. Com. R. 454.

Cement burial vaults are four times heavier than iron, and occupy but little more space in the car. Their value and the cost of materials used in making them are less than in the case of iron vaults. They are made with unskilled labor, while skilled labor and an extensive plant are used in making iron vaults.—*Held*, that putting them in the same class is a discrimination.—*Van Camp B. V. Co. v. Ch. I. & L. R. Co.*, 12 Inters. Com. R. 93.

Old dynamos valuable only as junk should be classified and rated as junk of the highest class of metal used in the construction.—

National M. & W. Co. v. P. C. C. & St. L. R. Co., 11 Inters. Com. R. 581.

It is for the railway managers to say whether they will give lower rates on second-hand dynamos consigned to a repair shop, than on new dynamos—*National M. & W. Co. v. P. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 581.

The "Scheidel outfit," used in medical and scientific work, such as the use of the X-ray, wireless telegraphy, etc., is properly refused classification as ordinary electrical apparatus.—*Scheidel Co. v. Ch. & N. W. R. Co.*, 11 Inters. Com. R. 532.

For purposes of classification, leather scraps are not leather though composed of leather, and no reason appears why the classification of one should control the classification of the other.—*Newman v. N. Y. C. & H. R. R. Co.*, 11 Inters. Com. R. 517.

Sectional book cases are not entitled to a lower classification than other bookcases.—*Globe-Wernicke Co. v. B. & O. S. R. Co.*, 11 Inters. Com. R. 156.

The exaction of a higher rate for the transportation of shingles than is charged for the transportation of lumber and other lumber products is unwarranted as it discriminates against the latter products.—*Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.*, 10 Inters. Com. 489.

Cowpeas, the vines of which are used in the improvement of the soil, are not properly classed as fertilizer.—*Swaffield v. Atlantic C. L. R. Co.*, 10 Inters. Com. R. 281.

A cheap grade of brush made and sold for a blacking dauber is not entitled to be classified lower than bristle brushes in general.—*Derr Mfg. Co. v. Pa. R. Co.*, 9 Inters. Com. R. 646.

A carrier may properly charge a lower rate on steam coal than on domestic coal.—*McGrew v. Mo. Pac. R. Co.*, 8 Inters. Com. R. 630.

Where a shipper has complete freedom of choice how he will pack his goods for shipment, a classification which makes a reasonable charge more for goods packed in one way than for those packed in another, does not exceed the limits of the carrier's discretion.—*Trades League v. Phila. W. & B. R. Co.*, 8 Inters. Com. R. 368.

Placing iron pipe fittings packed in cases in a higher class than iron pipe fittings packed in kegs or barrels, is not unreasonable.—*Traders League v. Phila. W. & B. R. Co.*, 8 Inters. Com. R. 368.

A classification which makes the rate the same on milk in 40-quart cans and in crated bottles is a discrimination in favor of the latter mode of shipment.—*Milk Prod. P. Assn. v. D. L. & W. R. Co.*, 7 Inters. Com. R. 92.

If an open-end envelope is made, shipped and used, like an envelope, and is not made, shipped or used like a paper bag, it is not entitled to

be classified as a paper bag, but only as an envelope.—*Wolf Bros. v. Allegheny V. R. Co.*, 7 Inters. Com. R. 40.

Celery should be classified with similar garden vegetables.—*Tecumseh Celery Co. v. Cincinnati, J. & M. R. Co.*, 4 Inters. Com. R. 44, 318, 5 I. C. C. R. 663.

Soap substantially equal in value and held out as suited for like purposes, should be placed in the same classification.—*Beaver v. Pittsburg, C. & St. L. R. Co.*, 3 Inters. Com. R. 285, 564, 4 I. C. C. R. 733.

When a manufacturer describes his article to the public for the purpose of making a market for it, he also describes it for purposes of carriage and classification, and if he represents it to be far superior to ordinary laundry soap, he cannot insist on its being classified as such.—*Andrews Soap Co. v. Pittsburg, C. & St. L. R. Co.*, 2 Inters. Com. R. 626, 3 Inters. Com. R. 77, 4 I. C. C. R. 41.

Railroad ties should be classified with other rough lumber.—*Reynolds v. W. N. Y. & P. R. Co.*, 1 Inters. Com. R. 600, 685, 1 I. C. C. R. 393.

[36] Form of classification sheet.

A classification sheet is supposed to be expressed in so plain terms and form that the ordinary business man can understand it, and using it in connection with the rate sheets, can ascertain the lawful charges for transportation.—*Hurlburt v. L. S. & M. S. R. Co.*, 2 Inters. Com. R. 15, 31, 81, 448, 2 I. C. C. R. 122.

[37] Construction of classification sheets.

Railway officials who made a classification sheet will not be permitted to testify to their understanding of its proper construction.—*Hurlburt v. L. S. & M. S. R. Co.*, 2 Inters. Com. R. 15, 31, 81, 448, 2 I. C. C. R. 122.

In construing classification sheets, the intentions of the framers thereof, when such intention can be ascertained, should be given effect; and in arriving at such intention, the court should give no weight to the alleged intent of the shipper or to any local customs or usages of trades as to the meaning of words used in such classification sheets.—*Smith v. Gt. Northern R. Co.*, — N. Dak. —; 107 N. W. 56.

[38] Unlawful classification.

Discrimination through classification,—see post, § 31, notes [77]–[80].
Under-classification prohibited,—see post, § 34, notes.

A classification by which one of two commodities, the cost of transporting which is substantially the same, pays twice as much freight as to the other, is unlawful.—*Rea v. Mobile & O. R. Co.*, 7 Inters. Com. R. 43.

§ 29. Changes in schedule; notice required; * [power of commissions to allow changes on less notice].—

Unless the commission otherwise orders no change shall be made in any rate, fare or charge, or joint rate, fare or charge, which shall have been filed and published by a common carrier in compliance with the requirements of this act, except after thirty days' notice to the commission and publication for thirty days as required by section twenty-eight of this act, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, fare or charge will go into effect; and all proposed changes shall be shown by printing, filing and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The commission, for good cause shown, may allow changes in rates without requiring the thirty days' notice and publication herein provided for, by duly filing and publishing in such manner as it may direct an order specifying the change so made and the time when it shall take effect; all such changes shall be immediately indicated upon its schedules by the common carrier.

Provisions as to changes in schedules of rates filed with Interstate Commerce Commission,—see Interst. Com. Act, § 6.

Forfeitures and penalties for failure to give required notice of changes in schedule,—see post, § 56.

General power to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

Power of the state to regulate the mode of operation of railroads,—see ante, § 1, note [2].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Purpose of acts regulating railroads,—see ante, § 1, note [32].

Who are common carriers.—see ante, § 2, notes [2]–[7].

What constitutes a railroad or street railroad,—see ante, § 2, note [8].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Meaning of term “rate”—see ante, § 26, note [26].

Where laundry soap in less than carload lots had been placed in the fourth class in the first classification made under the Interstate Commerce Act, and had been voluntarily maintained there by the de-

* Words in brackets are not a part of section heading as enacted.—Ed.

feudant carriers for more than thirteen years, they were not justified in reclassifying such freight so it would pay 20 per cent. less than third class rates, without changing the carload classification, on the mere claim that the prior classification had been too low to pay the cost of transportation in less than carload lots, where the reclassification was not general and made no attempt proximately to apportion the cost of the service equally among the different articles of traffic as between carloads and less than carloads.—*Interst. Com. Commission v. H. & D. R. Co.*, 146 Fed. 559; *affd.* 206 U. S. 142, 27 Sup. Ct. R. (U. S.) 648

A carrier has a right, at common law, to make reasonable regulations as to the manner and form in which it will receive goods for shipment, and to change or modify such regulations from time to time, upon reasonable notice.—*Harp v. Choctaw O. & G. R. Co.*, 125 Fed. 445.

All advances in freight rates, and full data as to such advances, should be promptly filed with the Interstate Commerce Commission.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

Changes in rules and regulations which would affect the aggregate rate, must be shown by printing new schedules or indicating them upon the schedules posted at the time.—*Suffern, H. & Co. v. Ind., D. & W. R. Co.*, 7 Inters. Com. R. 255.

Only wilful failure to file and post notices of an advance in rates, etc., can make the carrier liable to a criminal action.—*Railroad Commission of Florida v. Savannah, F. & W. R. Co.*, 3 Inters. Com. R. 414, 688, 5 I. C. C. R. 13.

Reducing passenger rates without filing schedules thereof, and without the consent of the connecting lines over which the tickets are sold, violates Interst. Com. Act, § 6.—*In re Passenger Tariffs & Rate Wars*, 2 Inters. Com. R. 340, 2 I. C. C. R. 513.

A railroad, at common law, may change its classification of freight and passengers at its pleasure.—*Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 460.

State may require carriers to submit their schedules of rates, etc., in advance to a commission.—*Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607.

§ 30. Concurrence in joint tariffs; *[filing of all] contracts, agreements or arrangements between any carriers.—1. The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with

the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission; and where such evidence of concurrence or acceptance is filed, it shall not be necessary for the carriers filing the same also to file copies of the tariffs in which they are named as parties.

2. Every common carrier shall file with the commission sworn copies of every contract, agreement or arrangement with any other common carrier or common carriers relating in any way to the transportation of passengers, property or freight.

Similar provisions of Interstate Commerce Act,—see Interst. Com. Act, § 6.

Power of Commission to require special reports and information from carriers,—see generally, post, § 46.

Power of Commission to order joint tariffs and through routes,—see post, § 49.

Power of the state to regulate carriers' way of doing business,—see ante, § 1, note [2].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Purpose of acts regulating railroads,—see ante, § 1, note [32].

Who are common carriers,—see ante, § 2, notes [2]–[7].

What constitutes a railroad or street railroad,—see ante, § 2, note [8].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Receiving interstate shipments from connecting carrier makes a railroad wholly within a state engaged in interstate commerce,—see ante, § 25, note [7].

Provisions of Act applicable to through routes as well as single lines,—see ante, § 26, note [25].

Discriminations in joint through rates,—see post, § 31, notes [67]–[77].

What constitutes a through shipment,—see post, § 31, note [72].

Duty of carriers establishing joint rate to charge the published rate, see post, § 33, note [1].

Long and short haul section applies to through routes,—see post, § 36, note [2].

Liability of carriers on through shipments,—see post, § 38, notes [14]–[15].

Division of joint rates,—see post, § 49, note [29].

* Words in brackets are not a part of section heading as enacted.—Ed.

[1] Power of railroads to establish through routes and joint rates.

Power of Commission to order through routes and through rates,—
see post, § 49, note [24].

Supervision of Commission over through routes and rates,—see post,
§ 49, note [28].

Railroad corporations, unless forbidden by their charters, have power to contract for shipments the entire distance over any connecting lines.—*Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258.

A railroad is not authorized, by Interst. Com. Act, § 6, to form through routes and joint rates with a stage company and hotel association at Yellowstone Park.—*Wylie v. No. Pac. R. Co.*, 11 Inters. Com. R. 145.

There is no reason why a railroad, owned by one of its principal shippers, should not make joint rates, file joint tariffs, and agree upon joint divisions as other railroads do.—*Re Division of Joint Rates*, 10 Inters. Com. R. 385.

Contracts made by railroads with connecting carriers to provide through transportation, are within their incidental powers, if not restricted by their charters, and are commendable, if made with the bona fide purpose of regulating and facilitating traffic in a reasonable and just manner. If intended as, or amounting to, a traffic arrangement creating an authorized monopoly, they are against public policy, and void.—*Stewart v. Erie & W. Trans. Co.*, 17 Minn. 372.

The right of connecting carriers to make contracts for through rates, is incident to their powers unless prohibited by their charters.—*Munhall v. Pa. R. Co.*, 92 Pa. 150.

[2] "Through routes" and "through rates" defined.

What are connecting lines,—see post, § 35, note [18].

What constitutes a "through route," "through rate," and "continuous carriage" discussed and defined.—*Inters. Com. Commission v. C. N. O. & T. P. R. Co.*, 56 Fed. 925.

A through route is a continuous line of railway formed by an arrangement, express or implied, between connecting carriers.—*In the Matter of Through Routes and Through Rates*, 12 Inters. Com. R. 190.

A through route is a new unit, and therefore the rate for every service over it is a unit, even though it be divided between the several carriers arranging themselves into the through route. Through carriage implies a through rate and this is equally true whether the through rate be published as a whole by the joint action of the connecting carriers, or, in the absence of a joint arrangement, be published in portions by the several carriers. The route being one, a charge for a service over it is a charge

for a single service, all the terms of which must be fixed at one and the same time; that is, at the time the initial carrier enters into the engagement for the service. The rate is either a joint through rate made by arrangement by the parties to the through route, or it is a combination through rate consisting of the "separately established through rates, fares and charges applied to the through transportation." This sum, however, is a single rate for a single service, and a contract for through transportation is a contract for transportation at the through rate, whether jointly or separately established, in force at the time the shipment is billed.—*In the Matter of Through Routes and Through Rates*, 12 Inters. Com. R. 190.

There may be through routes without joint rates. A joint rate is simply a through rate, every part of which has been made by express agreement between the carriers making the through route. A joint rate is a rate over a through route, but it is not the only through rate recognized by the Interstate Commerce Act and the decisions.—*In the Matter of Through Routes and Through Rates*, 12 Inters. Com. R. 190.

The use of the adjective "joint" as applied to tariffs, etc., implies that it is the result of agreement or mutual consent.—*New York, N. H. & H. R. Co. v. Platt*, 7 Inters. Com. R. 323.

A rate fixed by legislative authority for a shipment over more than one road is a joint rate, though the order in form fixes the part which each road shall charge.—*State v. C. B. & Q. R. Co.*, 90 Iowa, 594, 58 N. W. 1060.

[3] When agreement with shipper for through transportation exists.

The receipt of goods marked for a place beyond the terminus of the carrier's route does not import an agreement to carry them to their final destination.—*Root v. Gl. Western R. Co.*, 45 N. Y. 524, revg. s. c. 2 Lans. (N. Y.) 199.

Acceptance of goods marked to a destination beyond a carrier's line is *prima facie* a contract for through transportation.—*Erie R. Co. v. Wilcox*, 84 Ill. 239.

A contract between a shipper and a carrier construed not to provide for transportation beyond terminus.—*Dunbar v. Port Royal & A. R. Co.*, 36 S. C. 110, 15 S. E. 357.

[4] When through route and through rates exist.

Trough routes a matter of contract,—see post, § 35, note [13].

That a shipper whose goods had to pass over several roads to reach their destination, made its contract solely with one company, is proof of an arrangement between the carriers for a continuous carriage.—*U. S. v. Standard Oil Co.*, 155 Fed. 305.

An express agreement for a through rate is not necessary to make a through route. The successive receipt and forwarding by two or more carriers, under through bills or any arrangement for a continuous carriage, constitutes assent to such common arrangement and makes the carrier a party to the contract, within the meaning of the Interstate Commerce Act.—*U. S. v. Wood*, 145 Fed. 405.

A through bill of lading is, as to the carriers recognizing it, conclusive evidence of this existence of such through route.—*In the Matter of Through Routes and Through Rates*, 12 Inters. Com. R. 190.

Where through billing is given by the originating carrier and is recognized by all connecting carriers to the destination, there is in existence a through route over which a through rate applies, which through rate is ascertainable from the tariffs of the participating carriers at the date of shipment, and any increase or decrease in the through rate so made up after the date of shipment, is not applicable to such shipments.—*In the Matter of Through Routes and Through Rates*, 12 Inters. Com. R. 190.

The receipt, forwarding and delivering of traffic by connecting carriers clearly establishes the existence of a common arrangement between the carriers for a continuous carriage or shipment.—*Phelps v. Tex. & P. R. Co.*, 6 Inters. Com. R. 36.

Through rates depend on the agreement between the carriers who transport the freight.—*In re Application of F. W. Clark*, 2 Inters. Com. R. 797, 3 I. C. C. R. 649.

[5] Joint tariff must show carriers uniting in making it.

Publication of joint tariffs,—see ante, § 28, notes [26]–[29].

A joint tariff of rates and charges must show on its face what carriers unite in making it, and if the joint tariff does not make that showing, no joint route or rate is established thereby.—*Lehman Co. v. Tex. & P. R. Co.*, 2 Inters. Com. R. 548, 3 Inters. Com. R. 706, 5 I. C. C. R. 44.

[6] Joint arrangements not within the statute.

The Interstate Commerce Act does not apply to arrangements or joint tariffs entered into by a railroad and a transportation company, for wagon conveyance of freight or property by the latter.—*Cary v. Eureka Springs R. Co.*, 7 Inters. Com. R. 286.

[7] What rates applicable to a through shipment.

Limit of a proper through rate,—see post, § 31, note [70].

Where a through route has been formed, the rate charged must be a through rate, and the shipments will move upon the rate existing at the time it is billed. If, however, no through route has been formed, ship-

ments will move, not upon one through journey, but upon a succession of journeys, and will be subject to any changes in rates made by any carrier, into whose possession the shipment has not been received.—*In the Matter of Through Routes and Through Rates*, 12 Inters. Com. R. 190.

[8] What is proper rate in absence of agreement for joint rates.

What rates a carrier may publish in absence of agreement for through route,—see ante, § 28, note [29].

Where the total distance of a shipment is not one for which a through or joint rate is made, but is one covered by combining two joint rates for portions of such distance, the lawful rate for such shipment is the sum of two such rates.—*U. S. v. Wood*, 145 Fed. 405.

Without an agreement neither of two connecting carriers may name or allow a lower through rate than the combination of their local rates.—*New York, N. H. & H. R. Co. v. Platt*, 7 Inters. Com. R. 323.

Where no joint tariff of rates has been established for transportation over a continuous line, the proper charge is the sum of the established local rates of the several carriers forming such continuous line.—*Lehman Co. v. Tex. & P. R. Co.*, 2 Inters. Com. R. 548, 3 Inters. Com. R. 706, 5 I. C. C. R. 44.

[9] Filing of statement showing concurrence in joint tariffs.

Forfeitures and penalties for failure to file evidences of concurrence in joint tariffs and traffic agreements,—see post § 56.

Where a joint tariff is published under the Interstate Commerce Act, all carriers subject to the Act which are named as parties to the said tariff must forthwith, upon publication thereof, file with the Interstate Commerce Commission a statement or certificate showing their acceptance of and concurrence in the tariff, and making them parties thereto.—*Form and Contents of Rate Schedules*, 6 Inters. Com. R. 267.

§ 31. Unjust discrimination.—No common carrier shall, directly or indirectly, by any special rate, rebate, drawback, or other device or method, charge, demand, collect or receive from any persons or corporation a greater or less compensation for any service rendered or to be rendered in the transportation of passengers, freight or property, except as authorized in this act, than it charges, demands, collects or receives from any other person or

corporation for doing a like and contemporaneous service in the transportation of a like kind of traffic under the same or substantially similar circumstances and conditions.

Penalties for unjust discriminations in rates on interstate shipments,—
see Elkin's Act, § 1, post, Appendix B.

Substantially similar provisions of Interstate Commerce Act,—see
Inters. Com. Act, § 2, post, Appendix B.

Provisions of Interstate Commerce Act relative to discriminations be-
tween shipper, localities or kinds or traffic,—see Inters. Com. Act,
§ 3, post, Appendix B.

Penalties for exaction of excessive fare,—see N. Y. R. R. L., § 39.

Maximum fares on street surface railroads,—see N. Y. R. R. L., § 101.

Provisions as to giving of transfers by street surface railroads,—see
N. Y. R. R. L., § 104.

Compensation allowed under Rapid Transit Act,—see N. Y. Rap. Tr.
Act, § 24, subdiv. 4.

Regulations of rates and fares by former Board of Rapid Transit Rail-
road Commissioners,—see N. Y. Rap. Tr. Act, § 34d.

Rates shall be reasonable in themselves,—see ante, § 26.

The published rate shall be charged,—see ante, § 26, post, § 33.

Persons localities and traffic shall not be subjected to undue prejudice
or disadvantage,—see post, § 32.

Transportation shall not be permitted at less than the scheduled rates,
by means of false billing, false classification, false weight, or any
other device or means,—see post, § 34.

A carrier shall not discriminate between connecting carriers,—see
post, § 35.

A carrier shall not make a greater charge for a shorter than a longer
distance unless especially authorized by the proper Commission,—
see post, § 36.

A carrier shall not discriminate between shippers in the furnishing and
distribution of cars,—see post, § 37.

Power of Commission to correct discriminatory rates,—see post, § 49.

Forfeitures and penalties for unjust discriminations in rates,—see
post, § 56.

General power to regulate property devoted to public use,—see ante,
§ 1, notes [1]–[22].

General power of the state to regulate rates and charges,—see ante,
§ 1, note [2].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

Who are common carriers,—see ante, § 2, notes [2]–[7].

What constitutes a railroad or street railroad,—see ante, § 2, note [8].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Regulations by Commission to prevent unjust discrimination presumptively reasonable,—see ante, § 23, note [1].

Extent of state and federal power to regulate rates,—see ante, § 25, note [10].

Provisions of Act applicable to through routes as well as single lines,—see ante, § 26, note [25].

Meaning of term “rate,”—see ante, § 26, note [26].

Power to prohibit rates unreasonably low,—see ante, § 26, note [46].

Duty of carrier to file and publish tariff schedules,—see ante, § 28, note [2].

Discriminations between localities in general,—see post, § 32, note [12].

Duty of carriers to charge the published rate,—see post, § 33, note [1].

[1] Rule of equality.

Duty not to discriminate through classification,—see post, note [77].
Actions to recover for discriminations in rates,—see post, notes [81]–[88].

Duty to charge rates reasonable in themselves,—see ante, § 26, note [29].

Long existence of rates gives no right to shipper or carrier to have same continued,—see ante, § 26, note [43].

Duty of carrier to make carload and less than carload rates,—see ante, § 26, note [45].

Tariff schedules as means of securing uniformity in rates and services,—see ante, § 28, note [4].

General duty of carriers not to discriminate as to facilities and service,—see post, § 32, note [1].

Duty to extend equal rates and facilities to connecting carriers,—see post, § 35, notes [1]–[7].

Duty of carrier not to charge more for short than for long haul,—see post, § 36, notes [4]–[5].

A state may enforce an equality of local rates as between all parties shipping for the same distance over the same road.—*Alabama & V. R. Co. v. Miss. R. R. Commission*, 203 U. S. 496, 27 Sup. Ct. R. (U. S.) 163.

The state may insist upon an equality of rates under equivalent conditions.—*Seaboard Air Line Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, affg. s. c. 48 Fla. 129, 37 So. 314, 48 Fla. 150, 37 So. 658.

Interst. Com. Act, § 2, not only makes it unlawful for a carrier to charge differently for equal services, but also to render greater services to one shipper than to another, for the same charge.—*Wight v. U. S.*, 167 U. S. 512, 17 Sup. Ct. R. (U. S.) 822.

It is no proper business of a common carrier to foster particular enterprises or to build up new industries, but it is bound to deal fairly with all the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons on an absolute equality.—*Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, affg. s. c. 37 Fed. 182.

Where the carrier fixes identical rates for two places some distance apart, on the same line, there must be equality in fact, as well as in form; but equality in form will be presumed to be equality in fact, until the contrary is shown.—*Detroit, G. H. & M. R. Co. v. Interst. Com. Commission*, 74 Fed. 803, revg. s. c. 57 Fed. 1005; affd. 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986.

Impartiality in serving their patrons is an imperative obligation of all railroad companies; equality of accommodations in the use of railroads is the legal right of everybody.—*Coe v. L. & N. R. Co.*, 3 Fed. 775.

The law does not require that the rates shall be the same over all lines between two points.—*Marley v. Norfolk & W. R. Co.*, 11 Inters. Com. R. 616.

Even though a proportional rate is a concession from the local rate, the carrier may not impose arbitrary conditions of enjoying that rate.—*Kehoe v. Evansville & T. H. R. Co.*, 11 Inters. Com. R. 172.

Rates on various commodities must bear just relation to each other as well as be reasonable *per se*.—*Page v. D. L. & W. R. Co.*, 6 Inters. Com. R. 548.

A carrier must charge all passengers equally for the same service, unless within one of the excepted classes, regardless of their relative social, political or business standing in the community.—*In re Boston & M. R. Co.*, 3 Inters. Com. R. 717, 5 I. C. C. R. 69.

In passenger transportation there should be absolute equality of payment from all persons enjoying the same accommodations.—*Smith v. No. Pac. R. Co.*, 1 Inters. Com. R. 611, 1 I. C. C. R. 208.

A short road wholly within one state, owning no rolling stock but used by coal companies, must be accessible to all shippers on equal and reasonable conditions.—*Heck v. E. Tenn. V. & G. R. Co.*, 1 Inters. Com. R. 498, 775, 1 I. C. C. R. 495.

Equality in charges being required under circumstances substantially similar, relative equality must be maintained in the ratio of similarity.—*Manufacturer's Union v. M. & St. L. R. Co.*, 1 Inters. Com. R. 483, 630, 2 Inters. Com. R. 228, 302, 3 Inters. Com. R. 115, 4 I. C. C. R. 79.

A carrier cannot unreasonably or unjustly discriminate in favor of one or against another where the circumstances and conditions are the same.—*Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, affg. s. c. 68 Hun (N. Y.), 486, 22 N. Y. Supp. 972.

A carrier will not be permitted to unjustly discriminate as to rates.—*Root v. L. I. R. Co.*, 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331n; *State v. Atlantic C. L. R. Co.*, — Fla. —, 44 So. 213; *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430.

At common law, and also under the N. Y. Railroad Law, a carrier could not unreasonably or unjustly discriminate between persons whose property was offered for transportation, but was bound to deal with them all substantially alike.—*People ex rel. Ohlen v. N. Y. L. E. & W. R. Co.*, 22 Hun (N. Y.), 533.

At common law, a carrier need not treat all customers equally, but may favor individuals as he pleases, providing he does not charge any one more than is reasonable.—*Cowden v. Pacific Coast Ss. Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221.

At common law, rates must be reasonable, but not necessarily equal.—*Johnson v. Pensacola & P. R. Co.*, 16 Fla. 623.

A railroad company, though permitted to establish its rates of transportation, must do so without injurious discrimination as to individuals. It must deal fairly by the public, and this it would not be doing if allowed so to discriminate as to build up the business of one person to the injury of another in the same trade.—*Chicago & N. W. R. Co. v. People*, 56 Ill. 365.

Carriers cannot legally make unequal and extravagant charges.—*New Eng. Exp. Co. v. Me. C. R. Co.*, 57 Me. 188.

At common law a common carrier is not obliged to transport goods and merchandise for all persons at the same rates.—*Fitchburg R. Co. v. Gage*, 12 Gray (Mass.), 393.

A carrier is bound to observe strictly the principle of equality in the conduct of its business.—*State ex rel. Atwater v. D. L. & W. R. Co.*, 48 N. J. L. 55, 2 Atl. 803.

Regardless of statute, a carrier is charged with the duty to transport merchandise for all parties on equal terms, where the carrying for some shippers at a lower price than for others will create monopoly by injuring or destroying the business of those less favored.—*Scofield v. L. S. & M. S. R. Co.*, 43 Oh. St. 571, 3 N. E. 907.

In dealing with the public, a carrier must at all times act upon the rule of equality.—*Houston & T. C. R. Co. v. Smith*, 63 Tex. 322.

[2] Discretion of carrier in fixing rates.

Discretion in fixing export rates,—see post, note [69].

The Interstate Commerce Commission has, as a rule, approved a reasonable differential between any raw material and the manufactured product, but where the amount of labor, increased value and extra risk

are so comparatively insignificant as upon grain whole and grain ground, and wherever the carrier has seen fit to waive its privilege of a slightly advanced rate for the carriage of the product, and the rate on the raw material is reasonably low, Commission will not interfere with that discretion.—*Matter of Rates on Corn & Corn Products*, 11 Inters. Com. R. 227.

In fixing rates for differing but analogous services, the carrier has the right to exercise an honest discretion.—*Carr v. No. Pac. R. Co.*, 9 Inters. Com. R. 1.

[3] "Unlawful discrimination" defined.

A railroad has a right, in the absence of statute, to charge less than the published tariff, unless such rate is given exclusively to one shipper, or denied to other shippers. It is the granting of the lower rate to one and denying it to another which constitutes unlawful discrimination.—*Christie v. Mo. Pac. R. Co.*, 94 Mo. 453, 7 S. W. 567.

To charge a shipper a rate less than the regular fixed rate is not discrimination, at common law. Charging one shipper a rate higher than that charged any one else, is discrimination.—*McNees v. Mo. Pac. R. Co.*, 22 Mo. App. 224.

[4] Not all discriminations unlawful.

When commissions will intervene,—see post, § 32, note [8].

It is proper, and lawful, under Interst. Com. Act, § 3, to give a preference or advantage, or to discriminate between persons, localities, or traffics, provided such preferences or discriminations be not undue or unreasonable.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45, affg. s. c. 74 Fed. 715, 69 Fed. 227; *Cincinnati, N. O. & T. R. R. Co. v. Interst. Com. Commission*, 162 U. S. 184, 16 Sup. Ct. R. (U. S.) 700; *Interst. Com. Commission v. Ch. G. W. R. Co.*, 141 Fed. 1003.

Mere inequality of charge does not constitute undue or unreasonable preference or advantage.—*Interst. Com. Commission v. Chicago G. W. R. Co.*, 141 Fed. 1003.

Only unreasonable discriminations are unlawful.—*Commercial Assn. v. L. & N. R. Co.*, 12 Inters. Com. R. 436.

If rates complained of are not proved to be unduly discriminative, the Interstate Commerce Commission cannot reduce them unless it deems them unreasonable in themselves.—*Commercial Assn. v. L. & N. R. Co.*, 12 Inters. Com. R. 436.

Not every inequality in rates is a discrimination, nor is every discrimination unlawful.—*Commercial Club v. Ch. & N. W. R. Co.*, 7 Inters. Com. R. 387.

Only unjust, unfair or oppressive discriminations are contrary to public policy.—*Cleveland, C. C. & I. R. Co. v. Closser*, 126 Ind. 343, 26 N. E. 159, 9 L. R. A. 754n.

A Pennsylvania statute prohibiting discriminations in rates and fares, prohibits only such discriminations as are unjust and unreasonable.—*Hoover v. Pa. R. Co.*, 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263.

Discriminations are unlawful, at common law, only when inconsistent with the public interest.—*Ragan v. Aiken*, 77 Tenn. 609.

[5] Whether mere making of rate constitutes discrimination.

A carrier cannot be said to be demanding, charging or collecting rates in violation of law until it has put the same into effect.—*Jewett v. Ch. M. & St. P. R. Co.*, 156 Fed. 160.

The mere making or offering of a discriminatory rate, under which it is not shown that a shipment was ever made, does not constitute a legal and actionable injury to a shipper, under the Interstate Commerce Act.—*Lehigh V. R. Co. v. Rainey*, 112 Fed. 487.

To constitute a discriminative charge punishable by penalties, it is not necessary that it should have been paid; it is enough if it has been made.—*Hines v. Wilmington & W. R. Co.*, 95 N. C. 434.

[6] Necessity for tangible injury.

In cases of discrimination in service or facilities,—see post, § 32, note [4].

That the person discriminated against is not directly injured does not justify a discrimination.—*Kindel v. A. T. & S. F. R. Co.*, 8 Inters. Com. R. 608.

Proof of tangible injury must be shown to make the preference or prejudice arising from a group rate unreasonable or undue.—*Milk Prod. P. Assn. v. D. L. & W. R. Co.*, 7 Inters. Com. R. 92; *Imperial Coal Co. v. Pittsburg & L. E. R. Co.*, 2 I. C. C. C. R. 618, 2 Inters. Com. R. 436.

Prejudice and advantage are undue and unreasonable only when they inflict some injury on the complaining party. Without such proof, mere advantage in rates in ratio to distance is not necessarily unlawful.—*Howell v. N. Y. L. E. & W. R. Co.*, 2 Inters. Com. R. 162, 2 I. C. C. R. 272.

[7] Whether there must be injury to complainants.

The absence of actual prejudice to the complainants does not excuse rates which otherwise violate Inters. Com. Act, § 2.—*Capital C. G. Co. v. Central Vt. R. Co.*, 11 Inters. Com. R. 104.

[8] Carrier bound by acts of agents.

A carrier is bound by the acts of its depot agent in giving rates.—*Southern R. Co. v. Anniston, F. & M. Co.*, 135 Ala. 315, 33 So. 274.

The receipt of goods marked for a particular destination beyond the terminus of the receiving carrier's line, without an express undertaking to do more than transport to that terminus and deliver to the connecting carrier, does not make such initial carrier bound by the statement of its local station agent as to the rates to be charged over the connecting lines.—*McLagan v. Ch. & N. W. R. Co.*, 116 Iowa, 183, 89 N. W. 233.

[9] Divisibility of contracts.

Where a contract for shipment of coal contains a clause void for giving discriminatory rates and also a clause apparently valid, the court will not enforce the latter where the apparent intent of the whole was to create a monopoly.—*Burlington, C. R. & N. R. Co. v. Northwestern F. Co.*, 31 Fed. 652.

[10] Joint and several responsibility of carriers.

It is the duty of a connecting carrier to transport cars delivered to it by initial carriers, and it is not rendered liable for an alleged wrongful act of the initial carrier merely because of the adoption of a joint through rate.—*Penn Refining Co. v. W. N. Y. & P. R. Co.*, 208 U. S. 208, 28 Sup. Ct. R. (U. S.) 268, affg. s. c. 137 Fed. 343.

It is not essential to the commission of the offense of giving a concession from a through rate over connecting lines of railroad that the rate be a joint one established by all the carriers and filed with the Interstate Commerce Commission. If an initial carrier accepts traffic for transportation and issues its bill of lading over a route made up of connecting roads for which no joint through rate has been published and filed, the lawful through rate to be charged is the sum of the local and joint rates.—*Chicago, B & Q. R. R. Co. v. U. S.*, 157 Fed. 830.

Each carrier which is a member of a through line which gives an unfair and oppressive joint rate, is severally as well as jointly responsible.—*Interst. Com. Commission v. L. & N. R. Co.*, 118 Fed. 613.

[11] Shipper may not rely on statements of carriers' agents as to rates.

A shipper is charged with knowing the lawful rate, if it has been duly published.—*U. S. v. Standard Oil Co.*, 155 Fed. 305.

Shippers and consignees cannot rely, for the lawful rate or charge, on what is quoted to them by the carriers' agents, but must be guided by the published rate sheets.—*Suffern, H. & Co. v. Indiana, D. & W. R. Co.*, 7 Inters. Com. R. 255.

[12] Secrecy of rate not test of lawfulness.

A special rate does not become unlawful merely because the public has no notice thereof.—*Hoover v. Pa. R. Co.*, 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263.

[13] Validity of bill of lading as affected by giving of rebates.

The giving of an unlawful rebate by a carrier does not invalidate the bill of lading under which the shipment was made so as to exempt the carrier from liability for loss of or injury to the goods shipped.—*Merchants' Cotton Press Co. v. N. A. Ins. Co.*, 151 U. S. 368, 14 Sup. Ct. R. 367, affg. s. c. 91 Tenn. 537, 19 S. W. 755.

[14] General rules and principles.

The words "undue" or "unreasonable" preference or advantage necessarily involve the idea or element of comparison of one service or traffic with another similarly situated and circumstanced, and require that, to be undue and unreasonable, the preference or prejudice must relate and have reference to competing parties, producing between them unfairness and an unjust inequality in the rates charged them, respectively, for contemporaneous service under substantially the same circumstances and conditions. In determining the question whether rates give an undue preference or impose an undue disadvantage, consideration must be had to the relation which the persons or traffic bear to each other and to the carrier.—*Interst. Com. Commission v. B. & O. R. Co.*, 43 Fed. 37; affd. 145 U. S. 263, 12 Sup. Ct. R. (U. S.) 844.

Rates cannot be adjudged in exact mathematical relation.—*National Hay Assn. v. L. S. & M. S. R. Co.*, 9 Inters. Com. R. 264.

Whether given rates violate the provisions of the Interstate Commerce Act is a question of fact.—*Export & Domestic Rates*, 8 Inters. Com. R. 214.

Differences in rates are discriminatory, unless justified by the carrier.—*New York Board of Trade v. Pa. R. Co.*, 2 Inters. Com. R. 660, 734, 755, 890, 4 I. C. C. R. 447.

Rates cannot be continually readjusted to equalize fluctuating market conditions.—*Squire v. Mich. Cent. R. Co.*, 2 Inters. Com. R. 303, 484, 3 Inters. Com. R. 515, 4 I. C. C. R. 611.

What is an unjust discrimination is a question of fact determinable from all the circumstances of the case.—*Root v. L. I. R. Co.*, 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331n.

[15] Ownership of freight as affecting duty of carrier.

As a condition of giving a carload rate, carriers may require that the goods shall be loaded at one time and place, that but a single bill of

lading shall be issued, that the shipment shall be from one consignor to one consignee; but, when goods are so loaded and when by the terms of sale they become the property of the consignee upon delivery to the carrier, the latter has no right to inquire whether the consignee obtained his title from one or several owners. If carriers accord a carload rating in case the consignor is the owner, they should extend the same privilege when the consignee is the owner.—*Buckeye Buggy Co. v. C. C. C. & St. L. R. Co.*, 9 Inters. Com. R. 620.

Whether a carrier may distinguish between a forwarding agent and the actual owner of the goods, discussed but not decided.—*Buckeye Buggy Co. v. C. C. C. & St. L. R. Co.*, 9 Inters. Com. R. 620.

Where the carrier owns the commodity it transports, and so is indifferent whether its profit accrues from the sale or the transportation, the only remedy available to the independent operator is to secure to him a reasonable rate.—*McGrew v. Mo. Pac. R. Co.*, 8 Inters. Com. R. 630.

Even if the carrier owns the commodities it transports, it can extend itself no other and different privileges than it extends to every other shipper.—*In re Grain Rates of Chicago G. W. R. Co.*, 7 Inters. Com. R. 33.

[16] Devices for giving preference.

Discrimination through classification,—see post, notes [77]–[80].

Rebates paid in the guise of commissions for obtaining business are unlawful.—*U. S. v. D. L. & W. R. Co.*, 152 Fed. 269.

Any device by which the net amount collected by the carrier from the shipper and retained, is reduced below the rate given in the published schedule, is a rebate.—*U. S. v. Chicago & A. R. Co.*, 148 Fed. 646.

If a carrier has published a schedule of rates to points beyond its own lines, transportation to such points at less than such rates is an unlawful rebate.—*U. S. v. Standard Oil Co.*, 148 Fed. 719.

Phrase “by any device whatever” in the Elkins Act interpreted and applied.—*U. S. v. Milwaukee Refrig. Co.*, 145 Fed. 1007, 142 Fed. 247.

The lawfulness of a “dummy” transit company as a device for procuring rebates in violation of law.—*U. S. v. Milwaukee Refrig. Co.*, 142 Fed. 247, 145 Fed. 1007.

The compression of cotton by a railroad cannot be used to effectuate a disparity in rates for a similar transportation service.—*Muskogee Club v. Mo. K. & T. R. Co.*, 12 Inters. Com. R. 356.

A carrier may not grant rebates by the device of allowances to elevator owners who in some manner return a portion thereof to the shippers.—*Allowances to Elevators by U. Pac. R. Co.*, 12 Inters. Com. R. 99.

Where the owner of the grain also owns the elevators with which the carrier makes an arrangement for elevation of the grain, if the allowance involves a profit over the actual cost of the service rendered, it becomes a rebate. It is not a rebate or discrimination where the allowance does not exceed the actual cost.—*Allowances to Elevators by U. Pac. R. Co.*, 12 Inters. Com. R. 99.

"Tap line allowances" are equivalent to rebates or reductions from the published rates.—*Central Y. P. Assn. v. Ill. Cent. R. Co.*, 10 Inters. Com. R. 505.

Free passes given to shippers on account of their traffic are a rebate or device resulting in discrimination.—*Milk Prod. P. Assn. v. D. L. & W. R. Co.*, 7 Inters. Com. R. 92.

The Interstate Commerce Commission will look beyond the device of a development or other subsidiary company in which the carrier or its owners hold the stock.—*In re Grain Rates of Chicago G. W. R. Co.*, 7 Inters. Com. R. 33.

To bear a part of the cartage expense of one shipper and not of another is equivalent to a rebate to the former.—*Hezel M. Co. v. St. L. A. & T. H. R. Co.*, 2 Inters. Com. R. 571, 3 Inters. Com. R. 701, 5 I. C. C. R. 57.

Arbitrary differentials resulting in discriminations are unlawful.—*Toledo Prod. Exch. & E. Kemble v. L. S. & M. S. R. Co.*, 2 Inters. Com. R. 492, 569, 3 Inters. Com. R. 830, 5 I. C. C. R. 166.

The method of rate making used by the carrier must not afford a cover for discrimination and injustice.—*N. Y. Prod. Exch. v. N. Y. C. & H. R. Co.*, 2 Inters. Com. R. 13, 28, 553, 3 I. C. C. R. 137.

Commissions paid to soliciting agents, when divided with the shippers, are equivalent to a rebate.—*In re Underbilling*, 1 Inters. Com. R. 813, 1 I. C. C. R. 633.

A carrier cannot discriminate between shippers by arbitrary tests or lines of demarcation.—*Providence Coal Co. v. Providence & W. Coal Co.*, 1 Inters. Com. R. 316, 363, 1 I. C. C. R. 86.

[17] Intent of carrier.

An intent to give or receive a preference in violation of Elkins Act, § 1, is shown by a conscious, intentional doing of that which the law prohibits.—*Chicago, B. & Q. R. Co. v. U. S.*, 157 Fed. 830.

In the case of an equivocal act which is unlawful if so intended, but not otherwise, or which is claimed to have been accidental, casual, or through mistake, evidence of unconnected but similar facts is always admissible to show intent or system, or rebut accident.—*U. S. v. Milwaukee Refrig. Transit Co.*, 142 Fed. 247, 145 Fed. 1007.

[18] Public right not affected by private agreements.

The public right to a just relation of rates cannot be abridged or enlarged by agreements between carriers with each other, nor by promises made to shippers.—*Commercial Club v. Ch. & N. W. R. Co.*, 7 Inters. Com. R. 387.

An agreement entered into by a carrier for the purpose of developing traffic, whether improvident or not, cannot be permitted to result in discrimination.—*Milk Prod. P. Assn. v. D. L. & W. R. Co.*, 7 Inters. Com. R. 92.

[19] Lowest rate given should be the standard.

Granting of rebates as evidence that rates rebated from are unnecessarily high,—see ante, § 26, note [36].

While it may be true that a local railway's share of an interstate rate may not be a legitimate basis on which a state railroad commission can establish and enforce a purely local rate, yet whenever, under the guise or pretense of a rebilling rate, some merchants are given a low local rate, the Interstate Commerce Commission is justified in making that the rate for all, and is not bound to inquire whether it furnishes adequate return to the railroad company.—*Alabama & V. R. Co. v. Miss. R. R. Commission*, 203 U. S. 496, 27 Sup. Ct. R. (U. S.) 163.

No rate can possibly be reasonable that is higher than anybody else has to pay.—*U. S. v. Chicago & A. R. Co.*, 148 Fed. 646.

If a railroad chuses to establish as to a certain favored class, a rate so low as to be unremunerative, justice demands and the law will require, that the rate be granted to all alike.—*Alabama & V. R. Co. v. R. R. Commission*, 86 Miss. 667, 38 So. 356.

The fact that another was charged less is material evidence tending to show that the smaller charge was a reasonable one.—*Great Western R. Co. v. Sutton*, L. R. 4 H. L. 226.

[20] Payment of rebate to person other than shipper.

That rebates are paid to some one other than the shipper is immaterial.—*U. S. v. D. L. & W. R. Co.*, 152 Fed. 269.

[21] Statutes forbidding discriminations — Validity.

Purpose of acts regulating railroads,—see ante, § 1, note [32].

What statutes regulating rates amount to a regulation of interstate commerce,—see ante, § 25, note [14].

The Interstate Commerce Act is not unconstitutional as depriving shippers of a natural right to make a private or secret contract for as advantageous a freight rate as they can obtain. No shipper has such a right.—*U. S. v. Standard Oil Co.*, 155 Fed. 305.

It being settled that Congress has authority to require that railroad rates shall be uniform, it necessarily follows that to preserve uniformity Congress may prohibit the doing of any act or thing whatever by any person or corporation calculated to impair uniformity, and may enforce such prohibitions by such penal provisions as it deems requisite.—*U. S. v. Standard Oil Co.*, 155 Fed. 305.

An act forbidding "all discriminations" in rates, with no qualifying word like "unjust", is unconstitutional.—*Chicago & A. R. Co. v. People*, 67 Ill. 1.

An act to prevent discriminations, etc., by express companies is valid.—*Adams Exp. Co. v. State*, 161 Ind. 328, 67 N. E. 1033.

[22] — Declaratory of common law.

Discriminations based on amount shipped unlawful at common law, — see post, note [44].

Construction of statutes declaratory of common law,—see ante, § 1, note [31a].

Statutes requiring charging of reasonable rates merely declaratory of common law,—see ante, § 26, note [1].

The provision in the Constitution of Colorado that "no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within this state, imposes no greater obligation on a carrier than the common law imposed.—*Atchison, T. & S. R. Co. v. D. & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. R. (U. S.) 185.

The Interstate Commerce Act, in so far as it forbids unjust or unreasonable rates, is an express legislative adoption of the principles of the common law, which obliged a carrier to carry for all, without unjust or unreasonable discrimination either in charges or in the facilities for actual transportation.—*Tift v. So. R. Co.*, 123 Fed. 789.

Section 4 of the North Carolina Act as to discriminations, etc., is construed as simply declaratory of the common law, and hence does not require a railroad to give one express company the same facilities it gives another.—*Atlantic Exp. Co. v. Wilmington & W. R. Co.*, 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393.

[23] — Construction of terms.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Statute providing penalties for unjust discrimination construed as penal,—see ante, § 1, note [35].

The term "a like kind of traffic," as used in Interst. Com. Act, § 2, does not mean traffic that is identical, but that is of "a like kind"

with other freight in the elements of a fair and just classification.—*N. Y. Board of Trade v. Pa. R. Co.*, 2 Inters. Com. R. 660, 734, 755, 800, 4 I. C. C. R. 447.

[24] — Effect on prior contracts.

An act of the Illinois Legislature forbidding unjust discriminations, etc., does not interfere with or abrogate prior contracts fairly made.—*Chicago & A. R. Co. v. C. V. & W. Coal Co.*, 79 Ill. 121.

The provisions of the Interstate Commerce Act forbidding discriminations, etc., apply to contracts made before the passage of the Act, and forbid the execution of contracts for rates discriminatory under the Act.—*Southern Wire Co. v. St. L. Bridge & T. Co.*, 38 Mo. App. 191.

[25] Determination of comparative reasonableness of rates — In general.

Whether rates are discriminatory is a question of fact,—see ante, note [14].

Secrecy of a rate not the test of its lawfulness,—see ante, note [12].

Dissimilarity of circumstances and conditions as justification for disparities in rates,—see post, notes [32]–[57].

Determination as to discriminations through classification,—see post, note [79].

Burden of proof as to discriminatory acts,—see post, note [85].

Where two routes exist the rate over shorter route the reasonable rate,—see also, ante, § 26, note [37].

Published rates the standard of reasonableness,—see ante, § 28, note [13].

Power of Commission to determine as to rates,—see post, § 49, notes [6]–[12].

Matters to be considered in determining as to reasonableness of rates,—see also post, § 49, notes [38]–[71].

Where a coal company owned by a railroad purchases coal at the mines or breakers, under a contract fixing the price to the vendor on the basis of a percentage of the average price received at tidewater in another state, the Interstate Commerce Commission may inquire into the manner in which the transaction was carried on and compel the testimony of witnesses, and the production of contracts, with view to ascertaining whether this transaction was the means whereby the railroads gave preferential rates to the coal companies.—*Interst. Com. Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. R. (U. S.) 563.

In determining whether a given rate is discriminative, conditions abroad as well as at home, and the interests of all classes and not of a single class should be considered.—*Texas & P. R. Co. v. Interst.*

Com. Commission, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666; *Export & Domestic Rates*, 8 Inters. Com. R. 214.

Questions of unjust discrimination or undue preference must be treated broadly and practically. The carrier's business is one which involves so many considerations, and the necessity for taking account of so many conditions and factors, that questions of this kind cannot be decided by any process of mere arithmetic or mathematical calculation, and do not admit of any rigidly theoretical rules in their solution.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

That the cost of delivering freight to the carrier for transportation varies with different stations is immaterial where the issue is as to the reasonableness of rates from such stations.—*Chicago F. P. Cov. Co. v. Ch. & N. W. R. Co.*, 8 Inters. Com. R. 316.

Relative distance, cost of service, volume of business, competition of rail and water ways, ocean service, terminal facilities, storage capacity, are elements of importance in determining the relative reasonableness of rates on shipments from interior points to seaboard cities.—*Boston Chamber of Commerce v. L. S. & M. S. R. Co.*, 1 Inters. Com. R. 354, 391, 462, 604, 754, 1 I. C. C. R. 438.

Where limited tickets are not in form a lowering of the rates, but a lower rate for a poorer service, the court will look beyond the terms of the ticket to the circumstances of the transaction, to see if there has been an actual lowering.—*Edson v. So. Pac. R. Co.*, 144 Cal. 182, 77 Pac. 894.

[26] — Circumstances of each case must determine.

Questions of alleged discrimination arising under a practice of partial or absolute free cartage, or growing out of the existence of side-tracks to shippers' doors, must depend largely for solution on the particular circumstances of each case.—*Hezel M. Co. v. St. L. A. & T. H. R. Co.*, 2 Inters. Com. R. 571, 3 Inters. Com. R. 701, 5 I. C. C. R. 57.

[27] — Reasonableness of rates in themselves material.

That a higher rate is not unreasonable in itself does not prevent its being discriminative.—*Samuels v. L. & N. R. Co.*, 31 Fed. 57.

The reasonableness of rates in themselves is a matter material to the issue raised by a charge that the relation between such rates and rates in another part of the country is unduly prejudicial to those using the former.—*Freight Bureau v. C. N. O. & T. P. R. Co.*, 6 Inters. Com. R. 195.

[28] — Comparisons with other rates.

Through rates as standard for determining reasonableness of local rates.—see post, note [71].

Through rate not basis for determining whether local rate violates long and short haul rule,—see ante, § 36, note [22].

The questions of unjust discrimination, under Interst. Com. Act, § 2, or undue preference, under § 3, often, if not always, involve a contrasting of the rates to other places and persons, since those sections involve the question of relative rates, with all their elements.—*Interst. Com. Commission v. L. & R. Co.*, 73 Fed. 409.

Where two railroads operating connecting lines unite in making a joint through tariff, they form for the purpose of that transportation practically a new and independent route. The making of a joint rate is not compulsory, but if they do make one, the through tariff on the joint line is not the standard by which the separate tariff of either company is to be measured.—*Chicago & N. W. R. Co. v. Osborne*, 52 Fed. 912, revg. s. c. 48 Fed. 49, certiorari denied, 146 U. S. 341, 13 Sup. Ct. R. (U. S.) 281.

Where the reasonableness of rates is in question, comparison may be made, not only with rates on another line of the same carrier, but also with those on the lines of other and distinct carriers.—*Freight Bureau v. C. N. O. & T. P. R. Co.*, 6 Inters. Com. R. 195.

The comparison of rates on one road or line with those on another for the purpose of determining the reasonableness of either, is valuable only to the extent of the similarity of circumstances and conditions attending the transportation in the two cases.—*Freight Bureau v. C. N. O. & T. P. R. Co.*, 6 Inters. Com. R. 195.

In determining the relative reasonableness of a rate markedly grouped, it may not fairly be compared with the rate per ton per mile from that station of the group which is farthest from the destination, but only with the rate from that station which is the average distance of all the stations in the group from the place of destination.—*Delaware Grange v. N. Y. P. & N. R. Co.*, 3 Inters. Com. R. 828, 5 I. C. C. R. 161.

Where a carrier has in good faith adopted a rate not unreasonable in itself, though exceptional, but forced upon it by the necessity of meeting a rate made by a railroad not subject to control by the same commission, such rate is not a fair basis of test of the reasonableness of other rates of such carrier.—*Business Men's Assn. v. Ch. St. P., M. & O. R. Co.*, 2 Inters. Com. R. 41, 2 I. C. C. R. 52.

[29] — Distance or mileage as factor.

In determining questions as to discriminations or undue preference in rates, under Interst. Com. Act, §§ 2, 3, mileage is a circumstance to be considered along with many others, but is neither decisive nor the most important.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

The comparative reasonableness of rates from a shipping point to two markets, so far as distance is controlling, should be tested by distance over the shortest available routes, rather than those over which the traffic is or may be actually carried.—*Chamber of Commerce v. Ch. M. & St. P. R. Co.*, 7 Inters. Com. R. 481.

It is proper for a carrier, within reasonable limits, to accept less per ton per mile upon long hauls than upon short ones and to widen the disparity between such rates as the difference in distance increases.—*Colorado F. & I. Co. v. So. Pac. Co.*, 6 Inters. Com. R. 488.

Distance or mileage is by no means the only, or in many cases the most important, factor in rate making, but, other things being equal, it is a circumstance of great, if not controlling weight.—*Freight Bureau v. C. N. O. & T. P. R. Co.*, 6 Inters. Com. R. 195.

Charges for distances greatly dissimilar need not be proportioned to the relative distances.—*Eau Claire v. Ch. M. & St. P. R. Co.*, 3 Inters. Com. R. 174, 314, 4 Inters. Com. R. 65, 5 I. C. C. R. 264.

The principle that the rate per ton per mile that can be justly charged should decrease with the distance cannot be invoked to overthrow a system of grouped rates made necessary by physical conditions.—*Manufacturers' Union v. M. & St. L. R. Co.*, 1 Inters. Com. R. 483, 630, 2 Inters. Com. R. 228, 302, 3 Inters. Com. R. 115, 4 I. C. C. R. 79.

[30] — Relations between carrier and shipper relevant.

Animosity between a carrier and a shipper may be proved by the latter to show the former wrongfully discriminated against him.—*Houston, E. & W. T. R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225n.

[31] — Consideration of contracts.

Where coal companies which had organized a competing line to tide-water made contracts with the railroads for the purchase of the collieries by the railroad companies, which resulted in the abandonment of the proposed competing line, the contracts are relevant evidence bearing on the manner in which rates are fixed, and their production may be compelled.—*Interst. Com. Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. R. (U. S.) 563.

[32] Dissimilarity of circumstances and conditions as justification — In general.

Dissimilarity as justifying discriminations in facilities and service,—see post, § 32, note [6].

Dissimilarity of circumstances as justification for violations of long and short haul rule,—see post, § 36, notes [24]–[35].

Cost of carrying as justifying violations of long and short haul rule,—see post, § 36, note [26].

Merely because rates to one point would ordinarily be less than rates to another, it does not follow that the rates to the one may be made

so low and to the other so high as to utterly exclude the latter from any share of the traffic originating on the line.—*Interst. Com. Commission v. L. & N. R. Co.*, 118 Fed. 613.

Substantially dissimilar conditions justify a dissimilarity in rates but will not justify every discrimination which a railroad chooses to make.—*Interst. Com. Commission v. T. & P. R. Co.*, 57 Fed. 948, affg. 52 Fed. 187; revd. on other grounds, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666.

To render a discrimination unlawful, a preference given to one person over another must be contemporaneous and under substantially similar conditions.—*Cowan v. Bond*, 39 Fed. 54.

That the favored shippers have no vested rights in them, but that they may be withdrawn at the pleasure of the carrier, does not excuse undue discriminations.—*Red Rock F. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 438.

Substantially dissimilar circumstances and conditions may justify a difference in the scale of rates to various points.—*Aberdeen Commercial Assn. v. Mobile & O. R. Co.*, 10 Inters. Com. R. 289.

That business was done in that particular way for many years before the Interstate Commerce Act was passed, does not legalize a practice amounting to unjust discrimination.—*Stone v. Detroit, G. H. & M. R. Co.*, 2 Inters. Com. R. 152, 185, 3 Inters. Com. R. 60, 3 I. C. C. R. 613.

Under a Pennsylvania statute forbidding discrimination, in order to entitle a shipper to recover for discrimination in rates, it must appear that the discrimination was made for a like service and under conditions alike in all material respects, and the burden of proof is on the plaintiff.—*Paine v. Pa. R. Co.*, 7 Kulp (Pa.) 187.

A threat by the owner of collieries that if he is not given a less rate than is given other collieries, he will build a railway of his own, does not justify the giving of a lower rate.—*Harris v. Cockermouth R. Co.*, 3 C. B. (N. S.) 693.

[33] — What constitutes dissimilarity in general.

The B. & O. R. Co. transported freight consigned to one party in Pittsburgh for a given sum and paid for the carting of the same to his warehouse, but charged another party the same amount for transportation to the depot merely. The former party had sidetrack connections with another road and could obtain transportation directly to his warehouse for the amount charged by the B. & O., but the latter party had no such connection and was obliged to pay his own cartage, over whichever line the freight was sent.—*Held*, that these facts did not show such a difference in circumstances and conditions as would justify the paying the cartage for one shipper and refusing to do a like service for the other.—*Wight v. U. S.*, 167 U. S. 512, 17 Sup. Ct. R. (U. S.) 822.

The carrying of goods of one shipper in carload lots and the carrying of goods which a forwarding agent receives in less than carload lots from various shippers and combines into carload lots, are not like and contemporaneous services, and the carrier is not prohibited by Inters. Com. Act, §§ 2, 3, from charging more for the latter than for the former service.—*Lindquist v. Grand Trunk W. R. Co.*, 121 Fed. 915.

The phrase "under substantially similar circumstances and conditions" refers only to the matters of carriage.—*Capital C. G. Co. v. Central V. R. Co.*, 11 Inters. Com. R. 104.

The "circumstances and conditions" surrounding a shipment are the same when the consignor is the actual owner of the entire carload as when the consignee is such owner.—*Buckeye Buggy Co. v. C. C. C. & St. L. R. Co.*, 9 Inters. Com. R. 620.

Transporting a private car of a commercial salesman is not a service substantially similar to transporting a private car of a pleasure party.—*Carr v. No. Pac. R. Co.*, 9 Inters. Com. R. 1.

An export rate is not made under similar circumstances and conditions with a domestic rate.—*Kemble v. Boston & A. R. Co.*, 8 Inters. Com. R. 110.

The English interpretation of what constitutes substantially similar circumstances and conditions is not wholly applicable to American transportation.—*R. R. Commission of Ga. v. Clyde Ss. Co.*, 4 Inters. Com. R. 120, 5 I. C. C. R. 324.

In passenger transportation the words "under substantially similar circumstances and conditions" relate to the nature and character of the service and not to the social, political or business affiliations of the passengers.—*In re Boston & M. R. Co.*, 3 Inters. Com. R. 717, 5 I. C. C. R. 69.

Differences in the social, political and financial standing of passengers do not make their transportation not "under substantially similar circumstances and conditions."—*In re Boston & M. R. Co.*, 3 Inters. Com. R. 717, 5 I. C. C. R. 69.

Where a railway enters into a contract whereby a shipper is permitted to erect a warehouse on railroad property for the reception, storage and shipment of grain at a certain station, the shipper to charge only compensatory commission for the storage and delivery of grain from said warehouse, and the railway agrees to carry the grain of the shipper in not less than carload lots at a rate less than that charged transient shippers, there is no unjust discrimination, as there is not a like service in both cases, under substantially like circumstances and conditions.—*America Central Ins. Co. v. Ch. & A. R. Co.*, 74 Mo. App. 89.

A railroad entered into a contract to carry coal to a manufactory for a certain rate, the manufacturing company being bound to take a certain

number of tons per day. It appeared that the railroad received a quantity of freight from the factory. A coal dealer, established in business subsequent to the making of the contract, was charged a greater rate for coal.—*Held*, that the conditions of the shipments were not substantially alike so that the difference in rate made an undue discrimination within the meaning of the statute of Pennsylvania providing that there should be no discrimination in rates “for a like service from the same place, upon like conditions and under similar circumstances.”—*Hoover v. Pa. R. Co.*, 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263.

One carload of lumber is “like” another.—*N. Y. T. & M. R. Co. v. Gallaher*, 79 Tex. 685, 15 S. W. 694.

The words “under similar circumstances” are used not with reference to what the parcels contain, or their ownership, but the parcels themselves and their conveyance.—*Great Western R. Co. v. Sutton*, L. R. 4 H. L. 226.

[34] — What difference in circumstances justifies.

What dissimilarity in “circumstances and conditions” makes differences in rates not discriminatory.—*Brewer v. Central of Ga. R. Co.*, 84 Fed. 258.

Dissimilarity in circumstances as warranting differences in rates.—*Bigbee & W. R. P. Co. v. Mobile & O. R. Co.*, 60 Fed. 545.

There must be reasonable, just and appreciable differences in conditions before a difference in rates can be allowed.—*Louisville & N. R. Co. v. Commonwealth*, 108 Ky. 628, 22 Ky. L. R. 328, 57 S. W. 508.

[35] — Determination of question.

It is for the Interstate Commerce Commission to determine whether, in given cases, the services rendered were like and contemporaneous whether the respective traffic was of a like kind, and whether the transportation was under substantially similar conditions.—*Texas & P. R. Co. v. Interst. Com. Commission*, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666, revg. s. c. 57 Fed. 48, affg. s. c. 52 Fed. 187.

Whether circumstances and conditions of carriage have been substantially similar or otherwise are questions of fact depending on the matters proved in each case.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. 45, affg. 74 Fed. 715, 69 Fed. 227; *Missouri Pac. R. Co. v. Tex. & P. R. Co.*, 31 Fed. 862, 4 Inters. Com. R. 434; *Phillips Co. v. L. & N. R. Co.*, 8 Inters. Com. R. 93.

[36] — Dissimilarity created by carriers themselves.

That one of the defendants originated the competition does not require that it should not be considered, but is immaterial. A contrary construction would discourage competition, which the Interstate Commerce

Commission Act was intended to foster.—*Interst. Com. Commission v. Ch. G. W. R. Co.*, 141 Fed. 1003.

Carriers cannot create the conditions by which they seek to justify their rates.—*Mayor of Tifton v. L. & N. R. Co.*, 9 Inters. Com. R. 160.

Carriers cannot create dissimilarity of conditions of competition simply by agreeing to compete at one point, and not to compete at the other.—*Holdzkow v. Mich. Cent. R. Co.*, 9 Inters. Com. R. 42.

A railroad must not create a disability for the sake of obtaining a differential.—*The Canadian Pac. Pass. Differentials*, 8 Inters. Com. R. 71.

Differences in circumstances and conditions of transportation that are of the carrier's own creation or connivance, or which it might have avoided by reasonable effort, do not justify inequalities in rates.—*Rice v. W. N. Y. & P. R. Co.*, 1 Inters. Com. R. 717, 792, 795, 811, 2 Inters. Com. R. 298, 4 I. C. C. R. 131.

A carrier cannot create artificial differences in market conditions, by an arbitrary differential in rates, whereby the products of different sections may be arbitrarily assigned to particular markets.—*Southern R. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429.

[37] — Whether competition may be considered.

See, also, post, § 32, note [10].

Competition as justifying violations of long and short haul rule,—see post, § 36, notes, [31]–[35].

In fixing their rates carriers may take into account competition by other carriers, provided only that the competition is genuine and not a pretense.—*Interstate Com. Commission v. Ch. G. W. R. Co.*, 209 U. S. 108, 28 Sup. Ct. R. (U. S.) 493, affg. s. c. 141 Fed. 1003.

Competition which affects rates and routes of traffic is a factor in determining whether conditions are similar and a rate is discriminative. If a dissimilarity exists, the question remains whether it is so great as to justify the discrimination alleged.—*East Tennessee, V. & G. R. Co. v. Interst. Com. Commission*, 181 U. S. 1, 21 Sup. Ct. R. (U. S.) 516, revg. s. c. 99 Fed. 52.

Competition between rival lines is not a factor to be considered in applying Interst. Com. Act, § 2. The phrase “under substantially similar circumstances and conditions,” as used in this section, does not include competition between rival routes but only the circumstances of carriage.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45, affg. s. c. 74 Fed. 715, 69 Fed. 227.

For a carrier to protect himself against the physical disadvantages it is under, in competition with its rivals, is not an unlawful discrimination, if it be not used as a colorable device to evade the statute.—

Detroit, G. H. & M. R. Co. v. Interst. Com. Commission, 74 Fed. 803, revg. s. c. 57 Fed. 1005, affd; affd. 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986.

That a lower rate is charged from a more distant point by reason of competition between routes is one of the "circumstances and conditions" which may be considered, under Interst. Com. Act, §§ 2, 3.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

"Commercial necessity" should be taken into account in determining whether rates are discriminatory.—*State v. Minneapolis & St. L. R. Co.*, 80 Minn. 191, 83 N. W. 60; affd. 186 U. S. 257, 22 Sup. Ct. R. (U. S.) 900.

Access to a competing route may be considered in deciding whether a lower rate to the shipper who has it, is an undue preference.—*Phipps v. London & N. W. R. Co.*, 1892, 2 Q. B. D. 229.

[38] — When competition exists.

The competition of one transportation line cannot be said to meet that of another, for the carriage of traffic from any particular locality, unless the one line could perform the service if the other did not.—*Behlmer v. L. & N. R. Co.*, 83 Fed. 898, revg. s. c. 71 Fed. 835; revd. on other grounds, 175 U. S. 648.

When, a few years ago, the railroad rates to Montgomery were higher than they now are, actual and active water-route competition by the Alabama River forced rail rates down to the level of the lowest practicable water rates. The volume of shipment is now very small.—*Held*, that the potential controlling influence of the water route remains in full force, and must ever remain in force as long as the river is navigable to its present capacity.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 74 Fed. 715, affg. s. c. 69 Fed. 227; affd. 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45.

Actual competition does not exist between carriers except where the traffic for which they compete would be taken by one of them if the other were not in the field; and such competition can be controlling at a given point only to the extent that either is in a position to do the entire business if the others were unable or unwilling to engage in it.—*Board of Trade of Chattanooga v. E. Tenn. V. & G. R. Co.*, 2 Interst. Com. R. 798, 3 Interst. Com. R. 106, 213, 5 I. C. C. R. 546.

[39] — What competition justifies disparities in rates.

Where a less rate is given for a long than for a short haul on the ground that competition exists at the point farthest distant, the mere fact that the rates to the nearer points are greater will not make them unreasonable and unjust under Interst. Com. Act, § 1.—*Interst. Com. Commission v. Western & A. R. Co.*, 88 Fed. 186; affd. 93 Fed. 83.

Competition consisting of or created by departures from published schedules does not justify disparities in rates.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

When competition is offered as an excuse for discriminative rates, the Interstate Commerce Commission will inquire whether it is legitimate competition, or whether due to the peculiar strength of the shippers and their power and ability to secure unusual concessions by playing one road against the other.—*Matter of Proposed Advances in Freight Rates*, 9 Interst. Com. R. 382.

Competition by an extremely roundabout route ought not to be encouraged, and is not necessarily such competition as justifies disparities in rates.—*Holdzkom v. Mich. Cent. R. Co.*, 9 Inters. Com. R. 52.

Where it is claimed that a low rate on a particular commodity is justified by water competition, it may be shown in rebuttal that this commodity is never in fact transported by water between the points in question.—*Holdzkom v. Mich. Cent. R. Co.*, 9 Inters. Com. R. 42.

That the carriers have made one of two cities a basing point does not justify giving competition its natural effect on rates at such basing point and not at the other city.—*Brewer v. L. & N. R. Co.*, 7 Inters. Com. R. 224.

Competition of carriers, competition of markets, differences in volume of traffic or cost of handling it, etc., do not defeat substantially similarity of circumstances and conditions.—*Railroad Commission of Ga. v. Clyde Ss. Co.*, 4 Inters. Com. R. 120, 5 I. C. C. R. 324.

[40] — Extent to which competition justifies.

The rate on lumber shipped to points on the New York and Long Branch Railroad was computed by adding to the New York city rate, five cents per cwt. on shipments from Saginaw, Mich., and two cents per cwt. on shipments from Buffalo, N. Y. This was attempted to be justified on the ground of water competition between Buffalo and New York City.—*Held*, that the effect of the water competition is exhausted when the lumber reaches New York city, and can justify no wider difference in rate than exists at New York city itself.—*Mershon v. Central R. Co. of N. J.*, 10 Inters. Com. R. 456.

A railroad rate so low as to drive water transportation out of existence cannot be justified by showing the existence of a waterway which might carry the traffic. Water competition may justify rates which meet, not extinguish, such competition.—*Brewer v. L. & N. R. Co.*, 7 Inters. Com. R. 224.

Water competition cannot justify rates highly unremunerative or grossly excessive.—*Rice v. Cincinnati, W. & B. R. Co.*, 3 Inters. Com. R. 841, 5 I. C. C. R. 193.

Even to meet water or rail competition rates cannot be reduced to cost.—*Lehmann v. So. Pac. R. Co.*, 2 Inters. Com. R. 548, 3 Inters. Com. R. 80, 4 I. C. C. R. 1.

[41] — What are “contemporaneous” shipments.

“Contemporaneous” shipments mean those in progress at the same time.—*Hilton L. Co. v. Atlantic C. L. R. Co.*, 141 N. C. 171, 53 S. E. 823.

[42] — Need of revenue by carrier as justification.

Financial necessity as justifying violations of long and short haul rule,—see post, § 36, note [27].

A carrier may not plead its need for additional revenue as justifying an advance in rates on a commodity, where such advance was made by concerted action of various carriers and under circumstances not warranting an advance.—*National Hay Assn. v. L. S. & M. S. R. Co.*, 9 Inters. Com. R. 264.

Even where the need of additional revenue is apparent the carrier cannot arbitrarily select some one or more articles on which to apply higher rates, regardless of the relation which such article or articles bear to other commodities commonly offered for transportation.—*National Hay Assn. v. L. S. & M. S. R. Co.*, 9 Inters. Com. R. 264.

Neither competition nor the need of greater revenue can operate to justify such unjust discrimination as is evidenced by a through rate on traffic from a competing locality higher than the combination of separately established charges to and from another competing locality on the direct through line.—*Hilton L. Co. v. Wilmington & W. R. Co.*, 9 Inters. Com. R. 17.

A carrier has not the right to do an unlawful act merely because it needs the revenue.—*Danville v. So. R. Co.*, 8 Inters. Com. R. 571.

[43] — Cost or value of article carried as justification.

Difference in bulk or value of goods carried as justifying violation of long and short haul rule,—see post, § 36, note [25].

That it costs one shipper more to manufacture his product than it does his competitor does not justify discrimination in rates.—*Phillips Co. v. Grand Trunk W. R. Co.*, 11 Inters. Com. R. 659.

It is not discrimination to charge the same rate on second-hand dynamos consigned to a repair shop as on new dynamos.—*National M. & W. Co. v. P. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 581.

Trifling differences of cost or character do not justify disparity of charges; but where the differences are substantial, either in the work

to be performed or in its utility and value to the person served, a fair relation of rates meets the carrier's obligation.—*Carr v. No. Pac. R. Co.*, 9 Inters. Com. R. 1.

That certain rates are all that certain traffic will bear is no reason for carrying it at less than cost at the expense of other traffic.—*In re Louisville & N. R. Co.*, 1 Inters. Com. R. 16, 278, 1 I. C. C. R. 31.

A carrier charged different rates for carrying steam and domestic coal.—*Held*, that this was not an unjust discrimination.—*Commonwealth v. L. & N. R. Co.*, 24 Ky. L. R. 509, 68 S. W. 1103.

[44] — Amount of freight shipped as affecting carriers' duty.

Amount shipped as justification for discrimination in facilities,—see ante, § 32, note [16].

Discriminations in freight rates based solely on the amount of freight consigned are unlawful and actionable at common law. The larger proportionate expense of handling a smaller shipment does not, of itself, warrant a railroad in charging a higher rate thereon than was charged for a larger shipment. Such increased proportionate expense does not differentiate the service performed for the several shippers, nor the conditions or circumstances under which it was performed.—*Kinsley v. Buffalo, N. Y. & P. R. Co.*, 37 Fed. 181.

Before the passage of the Interstate Commerce Act it was held that discriminations in the rates charged by a carrier to a shipper, based solely on the amount of freight shipped, without regard to any conditions tending to decrease the cost of transportation, are contrary to sound public policy and violative of that equality of rights guaranteed every citizen.—*Hays v. Pa. R. Co.*, 12 Fed. 309.

A carload rate made to meet water competition is not discriminative.—*Kindel v. Boston & A. R. Co.*, 11 Inters. Com. R. 495.

Carriers may lawfully establish carload and less than carload rates on cotton.—*Planters' Compress Co. v. C. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 382; *affd.* and applied, *Planters' Compress Co. v. Mo. K. & T. R. Co.*, 11 Inters. Com. R. 606.

Refusal to grant lower rates on cotton in carloads of 45,000 pounds or more is not an unlawful discrimination.—*Planters' Compress Co. v. C. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 382; *affd.* and applied, *Planters' Compress Co. v. Mo. K. & T. R. Co.*, 11 Inters. Com. R. 606.

Carriers may not lawfully establish trainload and less than trainload rates on cotton.—*Planters' Compress Co. v. C. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 382; *affd.* and applied, *Planters' Compress Co. v. Mo. K. & T. R. Co.*, 11 Inters. Com. R. 606.

It is reasonable and proper for carriers to fix a minimum weight and charge for the transportation of less than carload shipments.—*Wrigley v. C. C. C. & St. L. R. Co.*, 10 Inters. Com. R. 412.

A differential between carloads and less than carloads which is more than 50 per cent. of the car load rate is *prima facie* excessive, and requires special justification.—*Business Men's League v. A. T. & S. F. R. Co.*, 9 Inters. Com. R. 318.

It is doubtful whether, under the Interstate Commerce Act, a lower rate on the same kind of traffic can be justified by the fact that the volume of movement is larger and therefore the cost of service less.—*Export & Domestic Rates*, 8 Inters. Com. R. 214.

A lower rate on cargo or trainload lots than on carload lots is discriminative, even though all carload shippers are treated alike, and all trainload shippers alike.—*Paine Bros. v. Lehigh V. R. Co.*, 7 Inters. Com. R. 218.

While it is proper to give a less rate to shipments in carload lots than to shipments in less than carload lots, an unreasonable disparity between the carload and less than carload rates is unjust discrimination.—*Duncan v. A. T. & S. F. R. Co.*, 6 Inters. Com. R. 85.

The justice of a lower rate for carload lots can be decided only on the particular facts of each case.—*Brownell v. Columbus & C. M. R. Co.*, 4 Inters. Com. R. 285, 5 I. C. C. R. 638.

A lower rate on less than carload lots may be justified by the volume of traffic and facility in handling it.—*Brownell v. Columbus & C. M. R. Co.*, 4 Inters. Com. R. 285, 5 I. C. C. R. 638.

The aggregate receipts of the carrier from a carload of large tonnage should be greater than from a carload of less tonnage, but other things being equal, the rate per cwt. should be less in the former case.—*Murphy Co. v. Wabash R. Co.*, 3 Inters. Com. R. 649, 725, 5 I. C. C. R. 122.

Mere quantity in shipments cannot be allowed to affect rates therefor.—*Harvard Co. v. Pa. R. Co.*, 2 Inters. Com. R. 625, 3 Inters. Com. R. 257, 4 I. C. C. R. 212.

A different classification and rate for car-load and less than car-load lots is reasonable.—*Thurber v. N. Y. C. & H. R. R. Co.*, 1 Inters. Com. R. 397, 684, 2 Inters. Com. R. 742, 3 I. C. C. R. 473.

A difference between car-load and less than car-load rates so great as to destroy the business of small dealers, is unlawful discrimination.—*Thurber v. N. Y. C. & H. R. R. Co.*, 1 Inters. Com. R. 397, 684, 2 Inters. Com. R. 742, 3 I. C. C. R. 473.

What charge is reasonable and just in a common carrier in a given case is a complex question into which enters many elements for con-

sideration, including questions of time, place, distance, facilities, quantity and character of goods, and many other matters. The carrier can afford to carry 10,000 tons of coal or other property to a given place for less compensation per ton than he could carry fifty, and where the business is of great magnitude a rebate from the standard rate might be just and reasonable while it could not fairly be granted to another who desired to have a trifling amount of goods carried to the same point. So long as the regular standard rates maintained by the carrier and offered to all are reasonable, one shipper cannot complain because his neighbor, by reason of special circumstances and conditions, can make it an object to the carrier to give him reduced rates. At common law, a carrier could make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases for special reasons and upon special conditions.—*Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, affg. s. c. 68 Hun (N. Y.), 486, 22 N. Y. Supp. 976.

The fact that one shipper is able to furnish a larger number of carloads of freight for shipment than another shipper does not constitute a sufficient reason for discrimination in favor of the larger shipper.—*Louisville, E. & St. L. R. R. Co. v. Wilson*, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105n.

It is not *per se* a legal wrong for a carrier to give better rates to one who ships many car loads of grain than to one who ships a single car-load.—*Cleveland, C. C. & I. R. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754n.

Differences in rates between shippers, based on the amount of freight shipped without reference to conditions tending to decrease the cost of transportation, are unlawful discriminations.—*Rothschild v. Wabash R. Co.*, 15 Mo. App. 242, 4 S. W. 418.

The equality clause of the Statute of Railway Transportation being a re-enactment of the common law against unreasonable and unjust discrimination, it does not require the same price per ton for transporting large and small amounts of coal between the same points. To hold otherwise, would be to unjustly discriminate against the large shipper.—*Concord & P. R. Co. v. Forsaith*, 59 N. H. 122.

A discrimination between shippers as to rates, based solely on the difference in the aggregate yearly amounts of freight shipped, cannot be upheld.—*Scofield v. L. S. & M. S. R. Co.*, 43 Oh. St. 571, 3 N. E. 907.

To charge for a hamper containing small parcels as for such parcels separately is unreasonable and discriminatory.—*Pickford v. Grand J. R. Co.*, 10 M. & W. (Eng.) 399.

[45] — Other traffic from shipper or passenger as justification.

Consideration of extent of patronage in determining whether there is unjust discrimination in furnishing facilities,—see post, § 32, note [17].

That commercial travellers create freight business does not justify giving them special rates as travellers.—*Larrison v. Ch. & G. T. R. Co.*, 1 Inters. Com. R. 369, 1 I C. C. R. 147.

It is proper for a carrier to give a less rate to a manufacturing concern to which it brings coal than to a coal dealer, where it appears that the coal carried for the manufacturing concern is of a quality inferior to that carried for the dealer, and that the carrier, in addition, receives manufactured products from the former for transportation while the carrier's business with the dealer is limited to the carrying of coal.—*Louisville & N. R. Co. v. Commonwealth*, 108 Ky. 628, 22 Ky. L. R. 328, 57 S. W. 508.

It is not a valid ground for giving a preference to one of the customers of a railway company that he engages to employ other lines of the company for the carriage or traffic distinct from, and unconnected with, the goods in question, the advantage of carrying goods to other points not affecting the cost of carriage between the particular points.—*Baxendale v. G. W. R. Co.*, 5 C. B. (N. S.) (Eng.) 309.

[46] — Exclusive patronage by shipper as affecting duty.

A railroad cannot require one shipper to pay more for carrying the same kind of merchandise under like conditions, to the same places, than it charges others merely because such shipper refuses to patronize that railroad exclusively, while other shippers do.—*Menacho v. Ward*, 27 Fed. 529.

A carrier may by special contract give reduced rates to customers who stipulate to give it all their business and refuse those rates to others who are not able or willing to so stipulate, provided the charge made to the latter is not excessive or unreasonable.—*Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 22, 25 L. R. A. 674, affg. s. c. 68 Hun (N. Y.), 486, 22 N. Y. Supp. 976.

[47] — Discriminations to obtain traffic.

Where a railroad reduced rates on live stock in order to get its share of the traffic, for which several carriers were actively competing, it cannot be said that such reduction was "voluntary," within the meaning of the Interstate Commerce Act.—*Interst. Com. Commission v. Ch. G. W. R. Co.*, 141 Fed. 1003.

While a railroad has the undoubted right to change its rate on certain articles for the purpose of increasing its business, it has no right to

unduly discriminate against another kind of traffic.—*Chicago Live Stock Exch. v. Ch. G. W. R. Co.*, 10 Inters. Com. R. 428.

That it enables the carrier to get reshipments he could not otherwise have, does not justify a discriminative rate.—*Savannah Bureau v. L. & N. R. Co.*, 8 Inters. Com. R. 377.

A carrier may make a low rate to create traffic which otherwise would not be handled by any line.—*Grain Shippers' Assn. v. Ill. Cent. R. Co.*, 8 Inters. Com. R. 158.

A carrier may discriminate, by giving a lower proportionate rate, in order to get business which would otherwise go by a different route, if its charge to the shipper complaining is no more than reasonable.—*Ragan v. Aiken*, 77 Tenn. 609.

[48] — Unnecessary cost of operation not justification.

Extraordinary or unnecessary cost of operation or management cannot be permitted to cause unreasonable or unjust rates, discriminations, preferences or prejudices.—*Milk Prod. P. Assn. v D. L. & W. R. Co.*, 7 Inters. Com. R. 92.

[49] — Protection of carriers' interests.

An unlawful arbitrary is not justified by a desire of the carrier to protect its traffic by prohibiting every mill not located on its line from selling at points on its line.—*Blackwell M. & E. Co. v. Mo. K. & T. R. Co.*, 12 Inters. Com. R. 25.

A carrier may not raise the classification of railroad ties in order to keep them on its own line and their price low for its own interests.—*Reynolds v. W. N. Y. & P. R. Co.*, 1 Inters. Com. R. 600, 685, 1 I. C. C. R. 393.

A carrier can not rightfully establish its rates in order to keep on its line material for which it has use, or to keep the price low for its own advantage.—*Louisville, E. & St. L. R. R. Co. v. Wilson*, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 367n.

[50] — Failure of railroad to pay expenses.

That the total receipts of a carrier from local freight rates are insufficient to meet the expenses of the local business, does not justify it in an inequality of rates between different parts of the state, in one part too high and in another too low, or prevent a state commission from insisting that the lower rate be the uniform rate.—*Seaboard Air Line v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, affg. s. c. 48 Fla. 129, 37 So. 314, 48 Fla. 150, 37 So. 658.

The fact that one branch of a railroad, considered as a separate railroad, fails to pay expenses, does not justify excessive or discriminatory rates.—*Inters. Com. Commission v. L. & N. R. Co.*, 118 Fed. 613.

That a railway cannot earn a proper return without discriminating, does not justify such discrimination.—*Brewer v. L. & N. R. Co.*, 7 Inters. Com. R. 224.

[51] — Time of year.

A railroad may lawfully charge lower rates on coal in the summer months to keep its coal cars and their crews employed during that season of the year, provided such summer rates are *bona fide*, and offered to all persons on equal terms.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

[52] — Effect of investments and expenditures by shippers.

Continuance of discriminative rates cannot be required or excused on the ground that parties have made investments and built up a business relying on assurances from the carriers that such rates would be maintained.—*Potter Mfg. Co. v. Ch. & G. T. R. Co.*, 4 Inters. Com. R. 223, 5 I. C. C. R. 514.

The expenditure of large sums by the lessees of collieries for tramways to connect them with a railway does not justify the latter in carrying their coal for less than is charged other collieries.—*Harris v. Cocker-mouth R. Co.*, 3 C. B. (N. S.) 693.

[53] — Orders of military authorities.

Favoritism to shippers is not unlawful, if pursuant to the orders of the military authorities in charge of the road.—*Illinois Cent. R. Co. v. Ashmead*, 58 Ill. 487.

[54] — Contracts.

That they are made pursuant to long-standing agreements with the favored shippers does not excuse undue discrimination.—*Red Rock F. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 438.

[55] — Direction of movement of traffic.

Where the movement in a certain direction is greatly in excess of the movement in another, or where there is a substantial difference in the cost of operation by reason of heavy grades, or because the tonnage runs largely in one direction, it is conceivable that a discrimination in rates may not be unreasonable.—*Interst. Com. Commission v. L. & N. R. Co.*, 118 Fed. 613.

Disparities in rates for equal distances east and west-bound may be so great as to constitute discrimination.—*Menasha W. W. Co. v. A. T. & S. F. R. Co.*, 11 Inters. Com. R. 666.

Disparity in rates on eastbound and westbound traffic is justified by the conditions resulting from the empty-car movement in one direction.—*Phillips Co. v. Grand Trunk W. R. Co.*, 11 Inters. Com. R. 659.

It is not a violation of law to charge a greater passenger rate in one direction on certain trains than is charged in the other direction on all trains.—*Hewins v. N. Y. N. H. & H. R. Co.*, 10 Inters. Com. R. 221.

A higher rate from Boston to Janesville, Wis., than from Janesville to Boston, is not necessarily discriminative.—*Macloon v. Boston & M. R. Co.*, 9 Inters. Com. R. 642.

Discrimination between east and westbound traffic is unlawful.—*Kindel v. A. T. & S. F. R. Co.*, 8 Inters. Com. R. 608.

The fact that a rate over a road in one direction is less than the rate on the same class of traffic in the opposite direction does not, as in cases of hauls in the same direction, establish *prima facie* the unreasonableness of the higher rate.—*Duncan v. A. T. & S. F. R. Co.*, 6 Inters. Com. R. 85.

Unjust discrimination may consist of charging different rates for hauling like freight equal distances in different directions from a junction point.—*Blair v. Sioux C. & P. R. Co.*, 109 Iowa, 369, 80 N. W. 673.

[56] Discriminative contracts unlawful.

Contracts for carriage at less than published rates unlawful,—see post, § 33, note [6].

A contract to carry at a special rate is not an unjust discrimination in the absence of clear proof that it is an exclusive privilege.—*Bayles v. Kan. Pac. R. Co.*, 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480.

A rebate and rebate contract are unlawful.—*Indianapolis, D. & S. R. Co. v. Ervin*, 118 Ill. 250, 8 N. E. 862, disapproving *Toledo W. & W. R. Co. v. Elliot*, 76 Ill. 67, and *Erie & P. Dispatch v. Cecil*, 112 Ill. 180, which held rebates lawful.

A contract whereby a carrier agrees to carry the goods of one person at a less rate than those of any other person is illegal.—*Messenger v. Pa. R. Co.*, 36 N. J. L. 407, 37 N. J. L. 531.

[57] Passenger tickets.

Party rate tickets must be available to all persons,—see post, § 33, note [20].

Issuance of party rate tickets not unjust discrimination,—see post, § 33, note [20].

Party-rate tickets cannot be limited to particular classes of persons, but must be open to the whole public alike.—*In the Matter of Party Rate Tickets*, 12 Inters. Com. R. 110.

When a railroad company makes a reduction from its regular rates, which are not found unreasonable, it may require that the person desiring to avail himself of that reduction shall purchase a ticket and it may collect of all persons not holding such special ticket the reasonable ordinary fare.—*Cist v. Mich. Cent. R. Co.*, 10 Inters. Com. R. 217.

The issuance of mileage, excursion and commutation tickets is lawful, and except as otherwise directed by the Interstate Commerce Commission, they are exempt from the general rules of the statute.—*Sprigg v. B. & O. R. Co.*, 8 Inters. Com. R. 443.

Discontinuance of the sale of commutation tickets is not necessarily unlawful, under Interst. Com. Act, §§ 3, 22.—*Sprigg v. B. & O. R. Co.*, 8 Inters. Com. R. 443.

There is no unjust discrimination, within the meaning of Interst. Com. Act, § 3, when a carrier gives an excursion rate upon one occasion and refuses to give such a rate upon a similar occasion occurring thereafter.—*Cator v. So. Pac. Co.*, 6 Inters. Com. R. 113.

Where the carrier has announced in its published schedules that it would do so, it does not unjustly discriminate by collecting 25 cents extra fare from a passenger on the train without a ticket.—*Sidman v. Richmond & D. R. Co.*, 2 Inters. Com. R. 766, 3 I. C. C. R. 473.

Party rates less than the contemporaneous rates for single passengers constitute discrimination.—*Pittsburg, C. & St. L. R. Co. v. B. & O. R. Co.*, 2 Inters. Com. R. 572, 729, 3 I. C. C. R. 465.

"Settlers' tickets" are discriminative, if they give a rate lower than that charged other passengers enjoying the same accommodations, and they are not justified by a desire to build up new country or the carrier's future business.—*Smith v. No. Pac. R. Co.*, 1 Inters. Com. R. 611, 1 I. C. C. R. 208.

A railroad cannot sell mileage books at a lower price to commercial travellers than to the general public.—*Larrison v. Ch. & G. T. R. Co.*, 1 Inters. Com. R. 369, 1 I. C. C. R. 147.

Under L. 1857, ch. 228, providing that ticket offices should be kept open one hour before the departure of each passenger train from a station during certain hours and that in case a passenger failed to procure a ticket at a station where the ticket office was established and open, an additional fare of five cents might be charged, a railroad cannot collect such five cents in addition to the regular rate prescribed by law from a passenger who took a train at an hour when the office was not required to be and was not open.—*Nellis v. N. Y. C. R. Co.*, 30 N. Y. 505.

The extra charge of five cents which the law allowed from a passenger without a ticket could be collected only when the ticket office was open at the station where the passenger got on, and at that time, even though this was midnight, and the company had no legal duty to keep its ticket

offices open after 9 p. m.—*Held*, that the statutory penalty could be collected by the passenger for an extra charge under these circumstances.—*Chase v. N. Y. C. R. Co.*, 26 N. Y. 523.

A railroad may charge extra fare for passengers not purchasing tickets at station.—*Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 460.

A common carrier is not bound to establish commutation rates for a particular locality.—*State ex rel. Atwater v. D. L. & W. R. Co.*, 48 N. J. L. 55, 2 Atl. 803.

A carrier may establish commutation rates in and for one locality and refrain from establishing such rates in another.—*State ex rel. Atwater v. D. L. & W. R. Co.*, 48 N. J. L. 55, 2 Atl. 803.

If a railroad has established commutation rates, it is unjust discrimination for it to refuse to sell such a ticket to a particular individual, upon the same conditions as to the rest of the public.—*State ex rel. Atwater v. D. L. & W. R. Co.*, 48 N. J. L. 55, 2 Atl. 803.

A carrier may charge a reasonable amount more when the fare is paid on the train, instead of a ticket purchased at the station.—*Cincinnati, S. & C. R. Co. v. Skillman*, 39 Oh. St. 444.

[58] Issuance of passes.

Lawfulness of issuance of passes,—see post, § 33, note [11].

Prosecution for giving free transportation,—see post, § 33, note [17].

Passes were given by a railroad to persons not belonging to any of the excepted classes mentioned in Interst. Com. Act, § 22. It has been held that such an act constitutes an unjust discrimination.—*In re Charge to Grand Jury*, 66 Fed. 146.

[59] Commodity rates.

Denying commodity rates to hay but giving such rates to apparently all other commodities which come to the carriers in aggregate volume or tonnage equal to that of hay, is a discrimination.—*National Hay Assn. v. L. S. & M. S. R. Co.*, 9 Inters. Com. R. 264.

Carriers may make commodity class rates and special class rates to meet special conditions along their lines.—*N. Y. Board of Trade v. Pa. R. Co.*, 2 Inters. Com. R. 660, 734, 755, 800, 4 I. C. C. R. 447.

[60] Arbitrariness and differentials.

On shipments from Chicago to Mount Holly, N. J., the New York City rate was given, while on shipments to Pemberton, N. J., six miles further on, the New York rate plus an arbitrary of five cents per hundred pounds was charged.—*Held*, that the rate to Pemberton was unrea-

sonable as compared with that to Mount Holly and the difference between such rates should be reduced to two cents per hundred pounds.—*De Cou v. Pa. R. Co.*, 12 Inters. Com. R. 186.

An arbitrary rule which prevents mills not located on defendant's lines from selling at points on those lines is unlawful.—*Blackwell M. & E. Co. v. Mo. K. & T. R. Co.*, 12 Inters. Com. R. 25.

More than doubling the differential on corn meal while the same differential on hominy grits and bran is left unchanged, is discriminative.—*Matter of Rates on Corn & Corn Products*, 11 Inters. Com. R. 220.

A differential of more than five cents on corn products above the rate on corn is discriminative.—*Matter of Rates on Corn & Corn Products*, 11 Inters. Com. R. 212.

In the adjustment of differentials, no marked advantages should be given, certainly not by the creation of artificial conditions, to one locality as compared with another.—*In the Matter of Differential Rates*, 11 Inters. Com. R. 13.

Differentials between different ports should be adjusted, so far as possible, so that competitive traffic will be fairly distributed between the different lines of railway which serve these ports. No marked advantage should be given, certainly not by the creation of artificial conditions, to any one port over the other. The ideal condition would be the establishment of such rates that enterprise at either port in the way of improvement in service or facilities might be rewarded by increased business and that there might exist that healthy struggle of locality against locality which is the best security for proper commercial development.—*In the Matter of Differential Rates*, 11 Inters. Com. R. 13.

The differential between carload and less than carload shipments may properly vary with the locality and the circumstances.—*Business Men's League v. A. T. & S. F. R. Co.*, 9 Inters. Com. R. 318.

A differential against corn meal as compared with corn, not based on cost of service, difference in value, greater liability to injury, etc., is an unjust discrimination.—*Board of R. R. Comrs. v. A. T. & S. F. R. Co.*, 8 Inters. Com. R. 304.

Railroads may not, by arbitrary differentials, create artificial market conditions whereby two localities are prevented from profitably competing with each other in the same market, but the products of each are diverted to a different market.—*Export Rates from Points E. & W. of Miss. River*, 8 Inters. Com. R. 185.

Arbitrary differentials are not justified by a purpose of the carrier to make the raising of corn profitable by preventing rival sections of corn producers from competing in the same market.—*Export Rates from Points E. & W. of Miss. River*, 8 Inters. Com. R. 185.

Differentials of two cents to Philadelphia and three cents to Baltimore below the rates to New York appear to be legitimately based on the competitive relations of the carriers.—*New York Prod. Exch. v. B. & O. R. Co.*, 7 Inters. Com. R. 612.

A differential of more than five cents a hundred pounds on wheat as compared with rates for flour is discriminative and unlawful.—*Kauffman Milling Co. v. Mo. Pac. R. Co.*, 2 Inters. Com. R. 770, 779, 4 I. C. C. R. 417.

Arbitrary differentials resulting in discriminations between places are unlawful.—*Toledo Prod. Exch. & E. Kemble v. L. S. & M. S. R. Co.*, 2 Inters. Com. R. 492, 569, 3 Inters. Com. R. 830, 5 I. C. C. R. 166.

[61] Group rates and basing points.

Proof of tangible injury necessary to make preference arising from group rate unreasonable,—see ante, note [6].

The mill-group system of rate-making is not necessarily discriminative.—*Quimby v. Clyde Ss. Co.*, 12 Inters. Com. R. 459.

Group rates must of necessity result in a certain amount of discrimination. Such rates are not for this reason necessarily unlawful, since the discrimination may not be undue; but certainly in the construction of groups, care should be taken to produce as little discrimination as possible.—*Desel-Boettcher Co. v. K. C. S. R. Co.*, 12 Inters. Com. R. 254.

Carriers having voluntarily made certain cities common points as to rate-making, they must not now discriminate unjustly as between them to the disadvantage or injury of markets and enterprises which their assistance has built up on the reasonable expectation that common rates and substantially equal privileges would be continued.—*City Council v. Mo. Pac. R. Co.*, 12 Inters. Com. R. 127.

A carrier cannot, by the basing point system, arbitrarily make traffic bear the cost of two separate and distinct services beyond its destination; viz., the haul to the basing point and the haul back.—*Gustin v. Burl. & M. R. Co.*, 8 Inters. Com. R. 481.

Combination rates always afford an advantage to the basing point, and entail some disadvantage upon the town to which the combined rates are applied, and when traffic is brought to the two places to be distributed in common territory, the preferences and prejudices resulting from such rates must generally be held to be undue.—*Gustin v. A. T. & S. F. R. Co.*, 8 Inters. Com. R. 277.

Basing points cannot be arbitrarily selected.—*Board of Trade v. Central of Ga. R. Co.*, 8 Inters. Com. R. 142.

A carrier cannot make one city a basing point and another not, if the conditions of competition, etc., are substantially similar.—*Board of T. of Dawson v. Central of Ga. R. Co.*, 8 Inters. Com. R. 142.

c It is not undue prejudice to refuse to apply the group rate rule to Omaha and Council Bluffs.—*Commercial Club of Omaha v. Ch. & N. W. R. Co.*, 7 Inters. Com. R. 387.

The arbitrary whim of traffic managers cannot lawfully make one city a basing point and give competition its natural effect on rates there, but refuse to make another city likewise a basing point and to let competition have its natural influence on rates there.—*Brewer v. L. & N. R. Co.*, 7 Inters. Com. R. 224.

The practice of making one rate on the same product over a large district, and thus equalizing the burdens of transportation to the same market, is only justifiable under special and exceptional circumstances, and is not to be encouraged when the difference in the transportation expense from the various points is considerable and substantial.—*Newland v. No. Pac. R. Co.*, 6 Inters. Com. R. 131.

The Interstate Commerce Commission does not approve the method of rate-making which consists of making a rate to certain places, which are generally competitive points, and called basing points, and for all other places, generally places where there is no competition, by adding the local rate from the basing point which will yield the lowest possible aggregate rate. The inherent defect is that by this method the carriers treat traffic, intended to be continuous, as consisting of two kinds of service independent of each other, the one to the basing point on a through rate, and the other from the basing point to the intermediate point on a local rate.—*Perry v. Florida C. & P. R. Co.*, 3 Inters. Com. R. 416, 740, 5 I. C. C. R. 97.

The Interstate Commerce Act and the Interstate Commerce Commission do not approve the basing-point, or distributive point, method of rate-making, which builds up a particular center at the expense of surrounding towns, etc.—*Raworth v. No. Pac. R. Co.*, 2 Inters. Com. R. 614, 3 Inters. Com. R. 857, 5 I. C. C. R. 234.

Group rates from various coal mines may be made where the commercial necessities are substantially the same for all.—*Rand v. Ch. & N. W. R. Co.*, 2 Inters. Com. R. 313, 2 I. C. C. R. 540; *Howell v. N. Y. L. E. & W. R. Co.*, 2 Inters. Com. R. 162, 2 I. C. C. R. 272.

Owners of mines in a given district are not, as a matter of law, subjected to an unreasonable disadvantage by a system of group rates based on more than actual distance when shipping east and less than actual distance when shipping west.—*Coxe Bros. v. Lehigh V. R. Co.*, 2 Inters. Com. R. 195, 229, 3 Inters. Com. R. 460, 4 I. C. C. R. 535.

Charging the same rates for transporting milk from all points reached by a carrier's regular milk trains is not unlawful, but probably the best system.—*Howell v. N. Y. L. E. & W. R. Co.*, 2 Inters. Com. R. 162, 2 I. C. C. R. 272.

Differences in service by the carrier at various points under the same group rate, are unjust discriminations.—*Stone v. Detroit, G. H. & M. R. Co.*, 2 Inters. Com. R. 152, 185, 3 Inters. Com. R. 60, 3 I. C. C. R. 613.

A group rate is not unlawful if it places producers of the commodity on an equality in the common market.—*Imperial Coal Co. v. Pittsburg & L. E. R. Co.*, 2 Inters. Com. R. 18, 92, 210, 436, 2 I. C. C. R. 604.

[62] Charges for specific services.

Additional charges for special services,—see ante, § 26, note [35].

Carrier may not charge for special services not specified in published schedules,—see post, § 33, note [1].

Power of Commission to regulate charges for special services,—see post, § 49, note [12].

An extra and separate charge for icing service is not an unjust discrimination, until shown to be unreasonable and contrary to law.—*Kundsen Ferguson Fruit Co. v. Mich. Cent. R. Co.*, 148 Fed. 968.

A reasonable additional charge for reconsignment privileges at a point where such reconsignment causes some expense to the carrier, is not discrimination.—*St. Louis Hay & G. Co. v. Ill. Cent. R. Co.*, 11 Inters. Com. R. 486.

Charges for icing and refrigeration should be nondiscriminative.—*Matter of Charges for Transportation of Fruit*, 11 Inters. Com. R. 129.

In demurrage charges, refunds on account of delays because of weather, etc., must be *bona fide* and not arbitrary.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

A carrier may lawfully absorb the terminal charge on live stock in one market and exact it in another.—*Cattle Raisers' Assn. v. Fort Worth & D. C. R. Co.*, 7 Inters. Com. R. 513.

Collecting a terminal charge on live stock but not on dead freight is not a discrimination against live stock.—*Cattle Raisers' Assn. v. Fort Worth & D. C. R. Co.*, 7 Inters. Com. R. 513.

A higher rate for a special service by the carrier, such as speedy transit for perishable freight, is not discriminatory.—*Loud v. South Car. R. Co.*, 4 Inters. Com. R. 205, 5 I. C. C. R. 529.

A railroad cannot charge more for carrying grain to one elevator than to another elevator along its line in the same city.—*Vincent v. Ch. & A. R. R. Co.*, 49 Ill. 33.

[63] Violations of long and short haul principle.

See also, post, § 32, note [29].

See also, post, § 36, note [6].

A greater charge for a shorter than a longer haul is an unreasonable charge and an unlawful discrimination, as well as a violation of the long

and short haul rule.—*Phillips Co. v. L. & N. R. Co.*, 8 Inters. Com. R. 93.

Interst. Com. Act, § 3, forbidding unjust discriminations, applies even where a departure from the long and short haul rule of the Act is justified, if the disparity is so great as to result in discrimination.—*Raworth v. No. Pac. R. Co.*, 2 Inters. Com. R. 614, 3 Inters. Com. R. 587, 5 I. C. C. R. 234.

[64] Gross and net weights.

Although the fact that most shippers of a given article in part of a described territory were permitted to secure reduced rates by billing at net weight, while many other shippers of the same article in another portion of that territory paid higher rates through billing at the full weight of the package and its contents, is ample warrant for an order requiring the carriers to remove the unjust discrimination as between such shippers by discounting the practice of shipping at net weights in any part of the territory, yet on the other hand, unless the net-weight practice was prevalent throughout substantially the whole territory affected, and either authorized by carriers generally in that territory or so well known from constant and general application as to receive implied sanction, it would not of itself constitute a sufficient ground for an order requiring a reduction in rates when all the carriers applied their established charges on the basis of gross rates.—*Proctor v. C. H. & D. R. Co.*, 9 Inters. Com. R. 440, distinguishing 3 Inters. Com. R. 131, 4 I. C. C. R. 87.

An increase of one-sixth in the charge for the same service, through the device of charging for the gross instead of the net weight, is unreasonable.—*Proctor v. C. H. & D. R. Co.*, 2 Inters. Com. R. 614, 3 Inters. Com. R. 131, 4 I. C. C. R. 87; distinguished, 9 Inters. Com. R. 440.

[65] Shipments in private cars.

If a shipper owns a car and rents it to the carrier, he cannot contract for the exclusive use of such car except under circumstances and on conditions which do not operate as a discrimination against shippers not owning cars.—*Independent Ref. Assn. v. W. N. Y. & P. R. Co.*, 4 Inters. Com. R. 162, 5 I. C. C. R. 415.

A charge for carrying barrel packages in transportation is unreasonable when no similar or corresponding charge is made to tank shippers of oil, and the result is a greater cost of transportation to shippers who do not own tank cars.—*Independent Ref. Assn. v. W. N. Y. & P. R. Co.*, 4 Inters. Com. R. 162, 5 I. C. C. R. 415.

An arbitrary allowance to tank shippers of oil for leakage, etc., is unlawful, when no corresponding allowance is made to barrel shippers.

Rice v. Cincinnati, W. & B. R. Co., 3 Inters. Com. R. 841, 5 I. C. C. R. 193.

Where the carrier does not furnish special cars for a particular kind of traffic, but some shippers do while others do not, the carrier should most carefully adjust rates so that in the relative charges to each there shall be no discrimination against the shipper who has to use the ordinary facilities afforded by the carrier.—*Rice v. Cincinnati, W. & B. R. Co.*, 3 Inters. Com. R. 841, 5 I. C. C. R. 193.

The tank shipper may rightly enjoy the benefits of greater economy and convenience, but on no just principle of transportation can he lawfully be favored in the rates themselves.—*Rice v. Cincinnati, W. & B. R. Co.*, 3 Inters. Com. R. 841, 5 I. C. C. R. 193.

In a contest between different and competing methods of distributing an article of general consumption, the railroads should stand in a neutral attitude, and if absolute impartiality cannot be perfectly maintained, the disadvantage ought not to be on the side of the weaker contestant.—*Rice v. Cincinnati, W. & B. R. Co.*, 3 Inters. Com. R. 841, 5 I. C. C. R. 193.

In order to equalize conditions between tank and barrel shippers of oil, free return of barrels may be required, in a proper case.—*Rice v. Cincinnati, W. & B. R. Co.*, 3 Inters. Com. R. 841, 5 I. C. C. R. 193.

Payment of rent for private cars can not be used to give a rebate or a discriminative rate.—*Rice v. W. N. Y. & P. R. Co.*, 1 Inters. Com. R. 717, 792, 795, 811, 2 Inters. Com. R. 298, 4 I. C. C. R. 131.

It is the duty of a railroad to furnish suitable vehicles for the transportation of freight offered, and the fact that one shipper may be provided with cars of his own does not entitle him to an advantage in rates over a competitor who is not so provided.—*State v. C. N. O. & T. P. R. Co.*, 47 Oh. St. 130, 23 N. E. 928, 7 L. R. A. 319n.

[66] What facts show unjust discrimination.

Discriminative contracts unlawful,—see ante, note [56].

Discriminations in sale of passenger tickets,—see ante, note [57].

Issuance of passes,—see ante, note [58].

Commodity rates,—see ante, note [59].

Arbitrariness and differentials,—see ante, note [60].

Group rates and basing points,—see ante, note [61].

Charges for specific services,—see ante, note [62].

Violations of long and short haul rule,—see ante, note [63].

Gross and net weights,—see ante, note [64].

Shipments in private cars,—see ante, note [65].

Facts showing discrimination in through and local or foreign and domestic rates,—see post, note [67], [74].

Reasonableness of switching charges,—see ante, § 27, note [14].

Facts showing unjust discrimination in service and facilities,—see post, § 32, note [30].

Under-billing as form of unjust discrimination,—see post, § 34, note [2].

Preferences in compelling prepayment of charges by connecting carriers,—see post, § 35, note [6].

Facts showing unjust discrimination between connecting carriers,—see post, § 35, note [16].

Complainants were shippers of oil to Perth Amboy, at which port there was no market for oil in tanks, and all shipments therefrom were necessarily made in barrels. The defendant railroad made a charge for carrying the barrel package and of this charge complaint was made. It appeared that no extra charge was made on shipments in tank cars, but it also appeared that the complainants had never demanded the use of tank cars and were unable to use the same for their shipments.—*Held*, that there was no ground for a finding of discrimination in the charging for the weight of the barrel, such charge not being of itself unreasonable, and the failure to make a charge for the weight of the tank in which other producers made their shipments.—*Penn Refining Co. v. W. & N. Y. & P. R. Co.*, 208 U. S. 208, 28 Sup. Ct. R. (U. S.) 268, affg, s. c. 137 Fed. 343.

Where reduced rate round trip excursion tickets are issued by a railroad company and the return portion of such tickets are used by persons not entitled to use such tickets, such persons enjoy a preference over similar one-way travelers who pay their full fare and are unwilling to be participants in a fraud upon the railroad company.—*Bitterman v. L. & N. R. Co.*, 207 U. S. 205, 28 Sup. Ct. R. (U. S.) 91, affg. s. c. 144 Fed. 34.

The purpose of the Interstate Commerce Act is to secure equality of rates and destroy favoritism, and for those purposes is a remedial statute, to be interpreted so as reasonably to accomplish them. Its prohibitions against directly or indirectly charging less than the published rates are all-embracing and applicable to every method by which the forbidden results could be accomplished. Therefore a carrier not expressly authorized to deal in commodities by a charter granted prior to the passage of the Interstate Commerce Act cannot contract to sell, and to transport in completion of the contract the commodity sold, when the stipulated price does not pay the purchase cost in the market, the cost of delivery, and the published freight rates. And where such a contract for sale and transportation is illegal under the Interstate Commerce Act because the charge for transportation is less than the published rates, it is not made legal because in consideration of such sale and transportation, the carrier is released by the shipper from a claim amounting to more than the difference between the

published rate and the amount charged, for breach of a prior contract, where it appears that such prior contract was also illegal for the same reason.—*New York, N. H. & H. R. Co. v. Interst. Com. Commission*, 200 U. S. 361, 26 Sup. Ct. R. (U. S.) 272.

A packing company owned and maintained on its premises tracks and switches for its own convenience. These connected with a railroad, and on shipments by this company the said railroad was accustomed to refund \$1 per car for the use of the packing company's tracks in getting the shipments to the main line.—*Held*, that such allowance amounted to a rebate and was unlawful.—*Chicago & A. R. Co. v. U. S.*, 156 Fed. 558.

A charge of two cents per 100 pounds more on hay unloaded into a warehouse than on hay not so unloaded is unreasonable and discriminatory.—*St. Louis Hay & G. Co. v. So. R. Co.*, 149 Fed. 609; *affd.* 153 Fed. 728.

A railroad, in its published tariff schedules, gave its rate on packing house products shipped from Kansas City. The railroad collected the published rate from a certain shipper, but paid back \$1, and contended that this was for the use of the shipper's private track which connected its shipping dock with the railroad.—*Held*, that this act constituted the giving of a rebate within the meaning of the Interstate Commerce Act.—*U. S. v. Ch. & A. R. Co.*, 148 Fed. 646.

The stock of a short line railroad was owned by stockholders common to said road and the shipper. A long distance railroad connecting therewith made and published a joint traffic arrangement with it, and the joint rates published were lived up to. The division of the through rate was, however, grossly disproportionate, in favor of the short line. Whether this division constituted giving a rebate to the shipper, discussed but not decided.—*U. S. v. A. T. & S. F. R. Co.*, 142 Fed. 176.

Interstate Commerce Act, § 2, is not violated by the act of a carrier in buying a commodity, and then selling the same, to be transported over its own line at a price less than the aggregate of the cost, expense items, and its own published freight rates, unless such transaction is a mere device to cloak an intentional giving of a lower rate to some purchasers of that commodity; there being no ground for assuming that the loss is sustained by it as a carrier, rather than as a dealer.—*Interst. Com. Commission v. Chesapeake & O. R. Co.*, 128 Fed. 59; *affd.* as to result, 200 U. S. 361, 26 Sup. Ct. R. (U. S.) 272.

Where a carrier owes an ascertained sum of money, which is a legally enforceable debt, it is not a violation of the Interstate Commerce Act for it to pay such debt by carriage done for the creditor at its legally established rates.—*Interst. Com. Commission v. Ches-*

peake & O. R. Co., 128 Fed. 59; *affd.* as to result, 200 U. S. 361, 26 Sup. Ct. R. (U. S.) 272.

Along the shore at Ashland, Wis., was a track, owned partly by one railroad and partly by another, and operated under an agreement for joint use of the entire tracks. One railroad exacted \$2 per car from one shipper to whom side track connections had been given, in addition to the published tariffs, but did not make any additional charge to other shippers along the line.—*Held*, that the agreement for the use of the track made it an integral part of the railroad complained of; that the charge to one shipper and not to others was an unjust discrimination.—*Ohio Coal Co. v. Whitcomb*, 123 Fed. 359; *certiorari denied*, 191 U. S. 567, 24 Sup. Ct. R. (U. S.) 841.

A contract between a railroad and a coal company whereby the former agrees to maintain at rate of \$2.40 per ton on all shipments of coal of less than 100,000 tons annually by any one party, and a rate of \$1.60 to \$1.65 on shipments of more than 100,000 tons per annum, is void on the ground of discrimination.—*Burlington, C. R. & N. R. Co. v. Northwestern F. Co.*, 31 Fed. 652.

A statutory limitation of a railroad company's charges impliedly excludes, within the limits, any question of their reasonableness in a collateral suit, unless rebates etc., are alleged, systematically unequal. Occasional inequality, even though preferential, is not always necessarily unreasonable. But systematic relative inequality cannot be reasonable.—*Camblos v. Phila. & R. R. Co.*, Fed. Cases, No. 2,331.

A different rate on fire, building and paving brick is discriminative.—*Stowe-Fuller Co. v. Pa. Co.*, 12 Inters. Com. R. 248.

On shipments by the complainant of empty bags in less than car load lots from Newark to certain southern points, a rate of 38 cents per cwt. was charged while on like shipments by complainant's competitors from Newark to other southern points about equally distant a rate of 22 cents was made.—*Held*, that the former rate was unreasonable and unjust and should be reduced to 22 cents.—*Rau v. Pa. R. Co.*, 12 Inters. Com. R. 229.

That rates on cotton goods from the southeastern states are proportionately higher than those from New England does not in and of itself establish the unreasonableness of the higher rates.—*Enterprise Mfg. Co. v. Georgia R. Co.*, 12 Inters. Com. R. 149.

Persons may not lawfully be transported at a commodity rate, nor commodities at passenger rates, nor may one rate be applied to a mixed shipment of men and merchandise.—*Transportation of Newspaper Employees*, 12 Inters. Com. R. 16.

It is not discrimination to give reduced rates to the officials, employees and property of a telegraph company maintaining a telegraph

service on the carrier's lines. That such company also uses its line for commercial service does not affect the lawfulness of the concession.—*Matter of Railroad-Telegraph Companies*, 12 Inters. Com. R. 10.

That the rate on one or two lines between the same points is substantially lower, does not show the absolute or relative unreasonableness of the higher rate.—*Marley v. Norfolk & W. R. Co.*, 11 Inters. Com. R. 616.

If the rate on an article is absolutely and relatively reasonable to those who ship the great bulk of that article in the form in which it is commonly prepared for shipment, it does not become unreasonable and discriminative to a shipper of a less quantity of the same article merely because he chooses to prepare his shipments in a form which affords the carrier a greater profit per 100 pounds, particularly when the preparation of that article in the more profitable form would impose some degree of hardship upon a large majority of shippers because of its greater expense or for other reasons.—*Planters' Compress Co. v. C. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 382; *affd.* and applied, *Planters' Compress Co. v. Mo. K. & T. R. Co.*, 11 Inters. Com. R. 606.

That ocean steamship lines grant a lower rate to round bale cotton, which occupies less space per 100 pounds than square bale cotton, does not require rail carriers to do likewise.—*Planters' Compress Co. v. C. C. C. & St. L. R. Co.*, 11 Inters. Com. 382; *affd.* and applied, *Planters' Compress Co. v. Mo. K. & T. R. Co.*, 11 Inters. Com. R. 606.

Defendant established a rate from the mines to Baltimore to apply on coal carried by water from that point to points inside the Capes, except Norfolk, and a higher rate to Baltimore on coal for Norfolk, for which the only reason appeared to be that it does not care to transport coal to Norfolk.—*Held*, that the higher rate was discriminative.—*City Gas Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 371.

A carrier cannot be held responsible, before the Interstate Commerce Commission, for a discrimination in rates which is due to the fixing of one of the rates by a railroad commission of another state than that in which the rate complained of is charged.—*In the Matter of Freight Rates*, 11 Inters. Com. R. 180.

It is unreasonable for a carrier to require the billing of southern shipments to a certain point enroute as a condition of allowing a lower proportional rate, while it declines to assume responsibility for such billing and does not post in its stations tariffs by which the shipper can himself ascertain the rate at which the shipment should be billed.—*Kehoe v. Evansville & T. H. R. Co.*, 11 Inters. Com. R. 172.

In order to provide for the transfer of grain to other lines at its terminus, a railroad entered into a contract whereby it granted to a

certain person a tract of land upon which the grantee was to construct an elevator and sidings, and the railroad agreed to pay certain fixed elevator charges on grain delivered to said elevator by it for transfer. It appeared that the grantee was himself a dealer in grain and also that the charges agreed upon were reasonable for the service.—*Held*, that the contract was valid.—*Matter of Allowances to Elevators*, 10 Inters. Com. R. 309.

Where a railroad has published its rates for the carriage of a commodity, it cannot return a portion of such rate in order to equalize to different industries the cost of production.—*Central Y. P. Assn. v. V. S. & P. R. Co.*, 10 Inters. Com. R. 193.

A railroad company owned about a mile of track connecting a salt manufactory with certain railroads, but owned no equipment of any kind. The railroad was controlled by this salt company. An arrangement was made whereby a railroad with which the line connected hauled the salt from the mill over the switch and its own line, paying the first named road a percentage of the rate.—*Held*, that this was an improper arrangement, being purely a scheme to obtain a concession in the rate.—*Re Transportation of Salt from Hutchinson*, 10 Inters. Com. R. 1.

Where a reduced rate is made to the terminus of a through route under the compulsion of competition, a town not located on the line of the through route, but reached over a lateral connecting road, has a disadvantage of situation entailing an additional expense, and a reasonably higher rate to such town than the forced competitive rate to the more distant terminus of the through route, is not unjust discrimination.—*Johnson v. Ch., M. & St. P. R. Co.*, 9 Inters. Com. R. 221; *Lehman Co. v. So. Pac. R. Co.*, 3 Inters. Com. R. 80, 4 I. C. C. R. 1

Although a carrier transports the private cars of pleasure parties, hunting parties, etc., at round trip or special rates lower than local fares from station to station, allowing the cars to stop over at such places along the route as may be desired by their occupants or arranged for with them, it is not bound to make the same terms for the private car of a commercial salesman stopping over from town to town and using the carrier's sidetracks as a temporary location for his car, in which he exhibits samples and solicits orders.—*Carr v. No. Pac. R. Co.*, 9 Inters. Com. R. 1.

Deserted warehouses and depreciated values do not necessarily show that rates in question are unjustifiable.—*Danville v. So. R. Co.*, 8 Inters. Com. R. 409.

Combination rates may be unjustly discriminative, even though entirely reasonable in mere amount.—*Gustin v. A. T. & S. F. R. Co.*, 8 Inters. Com. R. 277.

Carriers mainly engaged in the transportation of export flour for many years published the same rate on wheat and flour, but now change their tariff so as to charge more for flour than for wheat.—*Held*, that this does not make an irrebuttable presumption of discrimination.—*Export & Domestic Rates*, 8 Inters. Com. R. 214.

A hotel and land company and a railroad were under substantially the same ownership and control. The land company bought tickets from the railroad for full price and then sold them only to its patrons at half price.—*Held*, that this does not constitute a discrimination against complainant remediable under the Interstate Commerce Act.—*Willson v. Rock Creek R. Co.*, 7 Inters. Com. R. 83.

That a railroad and a land or other subsidiary company are under a common ownership and control, and the latter company does acts which, if done by the railroad, would violate the Interstate Commerce Act, does not constitute necessarily a device to enable the road to evade its legal obligations.—*Willson v. Rock Creek R. Co.*, 7 Inters. Com. R. 83.

A railway owned a development company and had it purchase grain, which the former transported to market and sold, taking as payment for the transportation only the profit from the transaction, if any.—*Held*, that this was but a device to get traffic which it could not otherwise get, and to give a rate which otherwise would be palpably discriminative. Hence, the practice was unlawful.—*In re Grain Rates of Chicago, G. W. R. Co.*, 7 Inters. Com. R. 33.

Unless within the exceptions authorized by statute, discriminations in shipments of like commodities, based solely upon the purpose or "business motive" of the shipper, are unlawful whether affected directly or indirectly by methods of classifications.—*Duncan v. A. T. & S. F. R. Co.*, 6 Inters. Com. R. 85.

The arbitrary allowance of a "manufacturer's special rate" on coal is an unjust discrimination.—*In re Rates on Coal*, 3 Inters. Com. R. 609, 4 Inters. Com. R. 157, 5 I. C. C. R. 466.

Yardage and mileage payments by carriers to a firm owning improved stock cars, which more than pay the entire cost of the cars in two years, including expenses of operation, are unlawful rebates.—*Shamberg v. D. L. & W. R. Co.*, 3 Inters. Com. R. 173, 502, 4 I. C. C. R. 630.

A special tariff of freight rates for emigrants is an unlawful discrimination.—*Elvey v. Ill. Cent. R. Co.*, 2 Inters. Com. R. 804, 3 I. C. C. R. 652.

Petitioner had the carrier build sidetracks to the doors of his mill, so that unloading could be made directly from the cars. He complains because the carrier pays a large part of the cost of cartage for

shippers who do not have such sidetracks.—*Held*, the complaint does not necessarily make out a case of discrimination.—*Hezel M. Co. v. St. L. A. & T. H. R. Co.*, 2 Inters. Com. R. 571, 3 Inters. Com. R. 701, 5 I. C. C. R. 57.

A railroad may make special rates for immigrants as a class, and decline to give the same rate to others for whom different accommodations are furnished.—*Savery v. N. Y. C. & H. R. R. Co.*, 1 Inters. Com. R. 695, 2 Inters. Com. R. 210, 2 I. C. C. R. 338,

Free cartage, not included in the published schedules, is an unlawful rebate.—*Stone v. Detroit, G. H. & M. R. Co.*, 2 Inters. Com. R. 152, 185, 3 Inters. Com. R. 60, 3 I. C. C. R. 613.

It is not discriminative for a railroad to give, with its tickets, an agreement that in case the passenger purchases lands from the company, part or the whole of the purchase price of the ticket will be allowed in payment on the land.—*Smith v. No. Pac. R. Co.*, 1 Inters. Com. R. 611, 1 I. C. C. R. 208.

If a carrier offers to all a general rate which is reasonable, but gives to some a lower rate for special inducements, offering the lower rate to others if they will comply with such special inducements, it is not unjustly discriminating.—*Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, affg. s. c. 68 Hun (N. Y.), 486, 22 N. Y. Supp. 976.

It is unlawful for railroad companies to refuse to carry grain from one elevator upon the same terms as they carry grain from those of an elevator association.—*Kellogg v. Sowerby*, 93 App. Div. (N. Y.) 124, 87 N. Y. Supp. 413.

A discrimination of 7½ cents per ton on shipments of coal is unreasonable.—*Louisville, E. & St. L. R. R. Co. v. Crown Coal Co.*, 43 Ill. App. 228.

A discrimination of \$10 per car on shipments of railroad ties between the same points is unjust.—*Louisville, E. & St. L. R. R. Co. v. Wilson*, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 367n.

A contract whereby a railroad agreed to transport grain for a company at 16½ cents per cwt., at the same time stipulating that the shipper should pay 21 cents per cwt., of which 4½ cents was to be paid back as a rebate after the shipment was completed, is not invalid.—*Cleveland, C. C. & I. R. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754n.

A "milling in transit" contract between a carrier and shipper, by which the former contracts to credit on the freight charges on the latter's manufactured goods any charges on raw material shipped to the shipper's factory, is not, on its face, a violation of a statute against rebates or unjust discriminations.—*Laurel Cotton Mills v. Gulf & S. I. R. Co.*, 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

A carrier may employ certain shippers to perform services for it for compensation, and so to do is not discrimination, even though it diminishes such shippers' payments for transportation of their freight.—*Rothschild v. Wabash R. Co.*, 15 Mo. App. 242, 4 S. W. 418.

A railroad corporation agreed to carry merchandise for a party at a fixed rate less than it would carry for any other person.—*Held*, that this contract was illegal at common law.—*Messenger v. Pa. R. Co.*, 36 N. J. L. 407.

A carrier transporting logs to a sawmill cannot give a lower rate to a shipper who agrees to ship the lumber by the same route, than to one who makes no such agreement.—*Hilton Lumber Co. v. Atlantic C. L. R. Co.*, 136 N. C. 479, 48 S. E. 813, 141 N. C. 171, 53 S. E. 823.

[67] Foreign and domestic, and through and local rates—What adjustment carriers may make.

Legislative control over joint tariffs,—see ante, § 28, note [26].

Power of carriers to establish through routes and joint-rates,—see ante, § 30, note [1].

What constitute through or joint-rates,—see ante, § 30, note [2].

Withholding through rates as form of discrimination,—see post, § 32, note [23].

Duty of carriers establishing joint rate to charge rate published,—see post, § 33, note [1].

It often happens that where traffic moves over two or more railways a certain expense attaches to the interchange of that traffic, which makes reasonable the imposition of a higher rate than if the movement were over a single road for the same distance.—*Texas & C. P. Co. v. St. L. & S. F. R. Co.*, 12 Inters. Com. R. 78.

It is not unlawful for carriers to maintain reconsignment rates which are higher in some cases than their proportions of through rates, and that the reconsignment rate is sometimes the same as the proportion of the through rate does not warrant an inference of unjust discrimination.—*St. Louis Hay & G. Co. v. Ill. Cent. R. Co.*, 11 Inters. Com. R. 486

That certain through rates are less than the sum of the in and out rates does not make them necessarily unlawful.—*St. Louis Hay & G. Co. v. Ill. Cent. R. Co.*, 11 Inters. Com. R. 486.

Defendant transported coal from the mines to Baltimore. Part of it was for local consumption in Baltimore, and part was for reshipment by water.—*Held*, that a lower rate on the latter was justifiable.—*City Gas Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 371.

A railroad has no right to make one rate for passengers whose journey ends at the terminus of its branch line, and a lower rate for

passengers who travel beyond that line by the stages of a particular transportation company or who patronize the hotels of a particular association, in both of which the railroad owns a controlling interest.—*Wylie v. No. Pac. R. Co.*, 11 Inters. Com. R. 145.

It is not permissible, under Interst. Com. Act, § 2, for two or more carriers to establish a joint through rate, less than the sum of their locals, which is available only to a particular shipper or class of shippers, while denying such lower rate to other shippers of like traffic between the same points of origin and destination.—*Capital C. G. Co. v. Central Vt. R. Co.*, 11 Inters. Com. R. 104.

A through passenger rate higher than the sum of the two local rates making up the distance, by the amount of the bus fare for transfer between the two stations, is not discriminative where the reasonableness of such bus fare is not questioned.—*Behrend v. Wash. So. R. Co.*, 9 Inters. Com. R. 637.

A comparison of rates, showing a considerable difference between round trip and the aggregate of local fares, etc., is not in itself sufficient to condemn the higher rate as discriminative, as the conditions affecting local and through travel are substantially unlike. *Carr v. No. Pac. R. Co.*, 9 Inters. Com. R. 1.

In the absence of special and clearly justifying conditions, any permanent system of rates which renders a service for the foreigner at a less price than is paid by the American, is unjust to the American.—*Export & Domestic Rates*, 8 Inters. Com. R. 214.

The Interstate Commerce Act does not, as a matter of law, prohibit the charging of an export and a domestic rate upon the same traffic to the same point.—*Export & Domestic Rates*, 8 Inters. Com. R. 214.

The Interstate Commerce Commission ought not to interfere with a low export rate, unless it clearly appears that the disparity is unduly great, or that no conditions abroad require it.—*Export & Domestic Rates*, 8 Inters. Com. R. 214.

A low export rate may sometime be necessary to dispose of our surplus wheat, and to promote the movement abroad of our surplus corn.—*Export & Domestic Rates*, 8 Inters. Com. R. 214.

In the application of export rates, intermediate territory should not be discriminated against. In no case should the rate from the more distant point to the seaboard be less than that from intermediate points on the same line.—*Export & Domestic Rates*, 8 Inters. Com. R. 214.

Whatever line participates in a low export rate must make a corresponding rate on similar traffic from intermediate points on its line.—*Export & Domestic Rates*, 8 Inters. Com. R. 214.

In competition for business, carriers may with propriety make a lower charge on export than on domestic traffic.—*Export & Domestic Rates*, 8 Inters. Com. R. 214.

Higher through or combination rates on corn for export from Illinois than from Iowa are discriminative.—*Export Rates from Points E. & W. of Miss. River*, 8 Inters. Com. R. 185.

An export rate of an inland carrier is essentially the division of a through export rate, and a lower rate to a port on goods for export than on those for local consumption is not necessarily a discrimination.—*Kemble v. Boston & A. R. Co.*, 8 Inters. Com. R. 110.

Carriers may lawfully make through rates from points in the United States to foreign countries, or vice versa, of which the portion paid to the inland carrier within the United States is less than the rate of such carrier on domestic commodities.—*Kemble v. Boston & A. R. Co.*, 8 Inters. Com. R. 110, overruling *N. Y. Bd. of T. & T. v. Pa. R. Co.*, 3 Inters. Com. R. 417, 4 I. C. C. R. 447, to conform to *Texas & P. R. Co. v. Inters. Com. Commission*, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666, 5 Inters. Com. R. 405.

A lower rate on trainload than on carload lots is not justified by the fact that the former are for export.—*Paine Bros. v. Lehigh V. R. Co.*, 7 Inters. Com. R. 218.

The addition of a reasonable local rate to a reasonable through rate in order to fix the through charge to the local station is likely to produce a relatively unreasonable rate to that station. The difference in situation of the basing and local points in respect of through traffic is not properly measured by the rate for carriage between them.—*Railroad Commission of Ga. v. Clyde Ss. Co.*, 4 Inters. Com. R. 120, 5 I. C. C. R. 324.

In making and filing export tariffs, the rate to the seaboard should not, unless in exceptional cases, be less than the inland tariff rate.—*N. Y. Prod. Exch. v. N. Y. C. & H. R. R. Co.*, 2 Inters. Com. R. 13, 28, 553, 3 I. C. C. R. 137.

When two carriers enter into an agreement for joint rates, covering all stations on their lines in the state, they create virtually a new, independent line, which is subject to the law as to discriminations.—*Blair v. Sioux C. & P. R. Co.*, 109 Iowa, 369, 80 N. W. 673.

A through rate may be made less than the sum of local rates between the same points.—*Southern R. Co. v. Commonwealth*, 116 Ky. 907, 25 Ky. L. R. 1078, 77 S. W. 207.

A carrier may charge higher rates for local or domestic freight than for through or extra-territorial freight.—*Shipper v. Pa. R. Co.*, 47 Pa. 338.

[68] — Exaction of local rates on through traffic.

No fair or equitable construction will justify the exaction of local rates for freights not local.—*Augusta S. R. Co. v. Wrightsville & T. R. Co.*, 74 Fed. 522; *Calloway v. L. & N. R. Co.*, 7 Inters. Com. R. 431.

The charge of a local rate for a part of a through haul, when the extra expense of a local haul has not been incurred, is *prima facie* excessive.—*Board of Trade v. Nashville, C. & St. L. R. Co.*, 8 Inters. Com. R. 503.

[69] — Discretion of carrier in fixing rate.

A lower rate for export traffic is merely in the discretion of the carrier.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

[70] — Measure of proper through rate.

What is lawful charge for through transportation when no joint rate has been established,—see post, § 30, note [8].

Ordinarily a through interstate passenger fare should not exceed the sum of the local state fares over the same route, though there is no legal requirement to that effect.—*Artz v. Seaboard Air L. R. Co.*, 11 Inters. Com. R. 458.

[71] — Through rates as standards of comparison.

Rates on through business do not show that a local rate is unreasonable, nor can local rates throw light on the justice or injustice of discrimination between through shipments having the same origin and destination.—*Southern R. Co. v. St. L. Hay & G. Co.*, 153 Fed. 728.

The through rate is not the standard of comparison of the local rate.—*Tozer v. U. S.*, 52 Fed. 917, revg. s. c. 39 Fed. 904; *Chicago & N. W. R. Co. v. Osborne*, 52 Fed. 912, revg. s. c. 48 Fed. 49, certiorari denied, 146 U. S. 341, 13 Sup. Ct. R. (U. S.) 281.

[72] — What constitutes a through shipment.

The determinative feature of a through shipment is the contract, and if the shipment starts and proceeds on a contract for through shipment, it may be considered such, and given the benefit of a through rate.—*Unlawful Rates in Trans. Cotton by K. C. M. & B. R. Co.*, 8 Inters. Com. R. 121.

Western grain was shipped to Kansas City on local bills of lading and at local rates, with no indication or arrangement that it was going further. It was then re-billed to Chicago and other points, at the "balance of the through rates" from its origin to such destination, and through manipulation of "expense bills," etc., such "balance of through rate" was made less than the rate obtained by deducting the local rate first paid from the through rate for the entire distance.—*Held*, that such

shipment and reshipment did not constitute a through shipment, was not entitled to the through rate, and was a discrimination against grain shipments originating in Kansas City.—*In re Atchison, T. & S. F. R. Co.*, 7 Inters. Com. R. 240.

[73] — Effect of non-consent of connecting carrier to through rate.

It may be an unlawful discrimination for a carrier to quote or allow a joint rate over the lines of a connecting carrier without the latter's consent, if such joint rate is less than the sum of the local rates of the two carriers.—*New York, N. H. & H. R. Co. v. Platt*, 7 Inters. Com. R. 323.

[74] — Division of through rate.

Where a railroad is owned by the largest individual shipper over it, an excessive division in favor of such road of the joint rates with other railroads amounts to an unjust discrimination.—*Re Divisions of Joint Rates*, 10 Inters. Com. R. 385.

The Interstate Commerce Commission has no authority to condemn the division of a through rate, unless a part of the through line and the article shipped have a common ownership, and a grossly excessive division is made for the purpose of paying a rebate.—*Re Transportation of Salt*, 10 Inters. Com. R. 148.

When freight is shipped over a through route, the fact that one railroad receives a share of the total through charge which is equal to its local rate for the carriage, is not sufficient to make the shipment a merely local shipment on that road.—*Independent Ref. Assn. v. W. N. Y. & P. R. Co.*, 6 Inters. Com. R. 378.

[75] — Complainant must be person affected by rate.

Disparity between through rates and local rates held not unduly discriminatory, when not complained of by any one directly affected thereby.—*Texas & P. R. Co. v. Interst. Com. Commission*, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666, revg. s. c. 57 Fed. 948, affg. s. c. 52 Fed. 187.

[76] — Identity of service.

The service rendered by a carrier in transporting a local passenger from one point on its line to another is not identical with the service rendered in transporting a through passenger over the same rails.—*Union Pac. R. Co. v. U. S.*, 117 U. S. 355, 6 Sup. Ct. R. (U. S.) 772, affg. s. c. 20 Ct. Cl. (U. S.) 70.

[77] Discrimination through classification — In general.

Power of Commission to prevent discrimination by classification,—see post, § 49, note [20].

A carrier may not discriminate between shippers by unjustified reclas-

sification of freight.—*Interst. Com. Commission v. C. H. & D. R. Co.*, 146 Fed. 559; *affd.* 206 U. S. 142, 27 Sup. Ct. R. (U. S.) 648.

A carrier may not subject a shipper of soap in less than carload lots to an undue disadvantage as compared with a shipper in carload lots, through an unjustifiable reclassification.—*Interst. Com. Commission v. C. H. & D. R. Co.*, 146 Fed. 559; *affd.* 206 U. S. 142, 27 Sup. Ct. R. (U. S.) 648.

Goods in the same classification are presumptively entitled to equal rates.—*McMorran v. Grand Trunk R. Co.*, 2 Inters. Com. R. 604, 3 I. C. C. R. 252.

Classification used as a device to affect unjust discriminations, etc., calls for preventive action by the Interstate Commerce Commission.—*Coxe Bros. v. Lehigh V. R. Co.*, 2 Inters. Com. R. 195, 229, 3 Inters. Com. R. 460, 4 I. C. C. R. 535.

[78] — Justification.

That by keeping hay in a higher classification, carriers would be more likely to promptly furnish cars for its movement, is no justification at all for a classification higher than the other facts warrant.—*National Hay Assn. v. L. S. & M. S. R. Co.*, 9 Inters. Com. R. 264.

[79] — How determined.

Determination of proper classifications,—see ante, § 28, notes [32]–[34].

The proper method of determining whether there has been discrimination in classification is comparison with the classification accorded by carriers on analogous articles.—*Brownell v. Columbus & C. M. R. Co.*, 4 Inters. Com. R. 285, 5 I. C. C. R. 638.

[80] — What constitutes.

Classification of specific articles,—see ante, § 28, note [37].

If the cost of transporting two commodities is substantially the same, it is discrimination to classify them so that one pays nearly twice as much as the other.—*Rea v. Mobile & O. R. Co.*, 7 Inters. Com. R. 43.

Classification of celery on a different basis than similar garden vegetables is discriminative.—*Tecumseh Celery Co. v. Cincinnati, J. & M. R. Co.*, 4 Inters. Com. R. 44, 318, 5 I. C. C. R. 663.

It is unjust discrimination to place in different classification soap substantially equal in value and held out as suited for like purposes.—*Beaver v. Pittsburg, C. & St. L. R. Co.*, 3 Inters. Com. R. 285, 564, 4 I. C. C. R. 733.

It is not unjust discrimination to give a higher classification to patent medicines than to ale and beer, in view of the higher commercial value and less volume of traffic of the former.—*Warner v. N. Y. C. & H. R. R. Co.*, 3 Inters. Com. R. 74, 4 I. C. C. R. 32.

Putting Pearline, which competes with common soap, in a classification where the rate is twice as great, is an unlawful discrimination.—*Pyle v. E. Tenn. V. & G. R. Co.*, 1 Inters. Com. R. 600, 767, 1 I. C. C. R. 465.

[81] Actions and proceedings—Right of action arising from unlawful discriminations.

Joint and several liability of carriers,—see ante, note [10].

Recovery of overcharges,—see ante, § 26, notes [52], [57].

Right of action by connecting carrier to recover for unjust discrimination,—see post, § 35, note [29].

Actions to recover for violations of long and short haul rule,—see post, § 36, notes [37]–[41].

Whether statutory remedies supplant existing remedies,—see post, § 40, note [2].

Mandamus to compel rendering of services without discrimination,—see post, § 57, note [13].

A person suing a public service corporation for discrimination in rates is not precluded from recovery on the theory that his payments were voluntary when he did not know of the discrimination and therefor made his payments under a mistake as to a material fact.—*Armour Packing Co. v. Edison E. L. Co.*, 115 App. Div. (N. Y.) 51, 100 N. Y. Supp. 605.

If the inability of a favorably located grain elevator to earn as much as other similarly situated elevators was occasioned by the unlawful acts of the defendant railroad companies and elevator association, or because of an unlawful discrimination enforced against the plaintiffs, they are entitled to recover any damages thus occasioned, no matter under what form of agreement the defendants may have acted, or what method of procedure they adopted.—*Kellogg v. Sowerby*, 93 App. Div. (N. Y.) 124, 87 N. Y. Supp. 413.

An action will lie at common law against a carrier for denying a shipper the equality of right which he was entitled to enjoy with the other patrons of such carrier.—*Langdon v. N. Y. L. E. & W. R. Co.*, 58 Hun (N. Y.), 122, 11 N. Y. Supp. 514, affg. s. c. 9 N. Y. Supp. 245.

[82] — Injunctions.

Restraining excessive charges,—see ante, § 26, note [48].

Enjoying discriminations between connecting carriers,—see post, § 35, note [30].

A suit in equity may be maintained at the instance of the government, to restrain railroad companies from discriminations in rates.—*U. S. v. Mich. Cent. R. Co.*, 122 Fed. 544.

[83] — Adequacy of remedy.

The damages which a shipper will suffer from the exaction of an unjust or discriminatory rate are in no way fully measured by the difference between a reasonable and just rate and the unreasonable and unjust rate.—*Jewett v. Ch. M. & St. P. R. Co.*, 156 Fed. 160.

[84] — Pleadings.

Answering a complaint of undue discrimination, the carrier alleged that it gave the favored company a lower rate in consideration of the settlement of pending litigation.—*Held*, this gave no basis on which an estimate could be made of the actual charges, and that such answer was insufficient.—*Goodridge v. U. Pac. R. Co.*, 37 Fed. 182; *affd.* 149 U. S. 680, 13 Sup. Ct. R. (U. S.) 977

Where the carrier has sought to justify a higher rate from one competing point than from another on the ground of greater distance, and the complainant shows no circumstances which counteract the influence of distance as a controlling factor, the complaint against such rates will be dismissed.—*Freight Bureau v. C. N. O. & T. P. R. Co.*, 7 Inters. Com. R. 180.

A complaint alleging a conspiracy between railroad companies and an association of elevator owners whereby the latter would discriminate in rates and service against a particular elevator, states a good cause of action.—*Kellogg v. Lehigh V. R. Co.*, 61 App. Div. (N. Y.) 35, 70 N. Y. Supp. 237.

A complaint which restricts the character of the action to a recovery under a Pennsylvania statute against discriminations, etc., providing a penalty for such action on the part of the carrier, will not enable a recovery of the damages to which the carrier would be liable at common law for such discriminations.—*Langdon v. N. Y. L. E. & W. R. Co.*, 58 Hun (N. Y.), 122, 11 N. Y. Supp. 514, *affg.* s. c. 9 N. Y. Supp. 245.

A complaint under the common law liability of a carrier for excessive charges fails to allege facts essential to a cause of action, where it contains no allegation that the rates charged and paid by plaintiff were in excess of the reasonable compensation for the services rendered; no allegation but that the rates paid by the other two corporations mentioned

were known to plaintiffs at the time of the shipment alleged in the complaint, or that the contract between the plaintiffs and defendants was not made with full knowledge of the rates paid by the corporations mentioned; no allegation of any protest by the plaintiffs against the rates charged to them, or demand that the services be rendered for the same prices charged to the other corporations, and so far as appears by the complaint, the amounts paid by plaintiffs for the services rendered may have been paid by them with full knowledge of all the facts, and under a special contract with the defendant based on those facts.—*Langdon v. N. Y. L. E. & W. R. Co.*, 9 N. Y. Supp. 245; *affd.* on other points, 58 Hun (N.Y.), 122, 11 N. Y. Supp. 514.

In an action against a carrier for unjust discriminations, it is not necessary to state each instance of discrimination as a separate cause of action.—*Cohn v. St. L. I. M. & S. R. Co.*, 181 Mo. 30, 79 S. W. 961.

In an action by a shipper to recover overcharges, etc., it is not necessary that the complaint should set forth the exact date of shipments by plaintiff, the dates and times defendant had given a lower rate to other shippers, etc., as defendant could ask for a bill of particulars.—*Hilton L. Co. v. Atlantic C. L. R. Co.*, 141 N. C. 171, 53 S. E. 823.

[85] — Burden of proof.

To establish discriminations in rates resulting from putting in the same classification articles of the same general character, there must be preponderating proof in favor of the complainant.—*Globe-Wernicke Co. v. B. & O. S. R. Co.*, 11 Inters. Com. R. 156.

When a shipper alleges that the allowance of lower rates on carload than less than carload lots constitutes discrimination, the burden of proof is on the complainant.—*Brownell v. Columbus & C. M. R. Co.*, 4 Inters. Com. R. 285, 5 I. C. C. R. 638.

Where no discrimination is alleged, either as between different points of production tributary to the same market, or on account of disproportionate rates on different kinds of traffic similar in character and volume, the burden is on the complainant of showing affirmatively that the rates charged are excessive.—*Lincoln Creamery Co. v. U. Pac. R. Co.*, 3 Inters. Com. R. 641, 794, 5 I. C. C. R. 156.

Goods in the same classification are presumtively entitled to equal rates, and the burden is on the carrier of justifying any disparity.—*McMorran v. Grand Trunk R. Co.*, 2 Inters. Com. 604, 3 I. C. C. R. 252.

No presumption arises that a rate is reasonable from the mere fact that it has been put into effect, and when it is *prima facie* disproportionate or relatively unequal, the burden is on the carrier to justify its charges when challenged on those grounds.—*McMorran v. Grand Trunk R. Co.*, 2 Inters. Com. R. 604, 3 I. C. C. R. 252.

In departing from the mileage basis of rates, as between the several branches of its road, a carrier is not making conclusive evidence that it is discriminating, but the burden is in the company to justify such departures when the rates are disputed.—*Logan v. Ch. & N. W. R. Co.*, 2 Inters. Com. R. 14, 19, 431, 2 I. C. C. R. 604.

In an action by a shipper to recover for discriminations in charges, the burden is on plaintiff to establish such discriminations by the greater weight of evidence.—*Hilton L. Co. v. Atlantic C. L. R. Co.*, 141 N. C. 171, 53 S. E. 823.

To recover for discrimination in rates in violation of a statute prohibiting discrimination in charges for transportation from the same place and "upon like conditions," the burden is upon the plaintiff to show that the conditions were alike.—*State v. So. R. Co.*, 125 N. C. 666, 34 S. E. 527.

[86] — Evidence.

In an action by a shipper to recover overcharges, it is competent to prove the rates charged others for transportation on other branches of the road, where conditions were substantially similar.—*Hilton L. Co. v. Atlantic C. L. R. Co.*, 141 N. C. 171, 53 S. E. 823.

In an action by a shipper to recover overcharges, etc., otherwise relevant testimony is inadmissible, for purposes of comparison, when it relates to an interstate shipment.—*Hilton L. Co. v. Atlantic C. L. R. Co.*, 141 N. C. 171, 53 S. E. 823.

[87] — Defenses.

An unliquidated, unexplained and indefinite claim for damages for a tort, which though put forward, has never been pressed, is no defense to an action against a carrier for discriminations in rates.—*Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. R. (U. S.) 970, affg. s. c. 37 Fed. 182

In an action against a carrier, the carrier pleaded as a defense a contract for a refund in case the favored shipper furnished a certain amount of transportation. It did not allege and show that such an amount was furnished. The defense was held ineffectual.—*Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. (U. S.) 970, affg. s. c. 37 Fed. 182.

In an action by a shipper against a carrier for damages for unjust, unreasonable and discriminatory charges, under the Interstate Commerce Act, the plaintiff must show that the rate charged was unreasonable according to the provisions of the Act. It is therefore a good defense in such an action to show that the charges complained of were in accordance with the schedule of rates adopted, printed and kept

posted by the carrier, pursuant to the Act. The Act provides the sole standard by which it may be determined whether a given rate is reasonable or unreasonable within the meaning of the Act.—*Van Patten v. Ch. M. & St. P. R. Co.*, 81 Fed. 545.

[88] — Damages.

How damages to shipper by discriminations in freight rates should be computed.—*Greisser v. McIlrath*, 13 Fed. 373.

In an action for damages by a shipper against a railway, because of discriminations, etc., forbidden by the state railroad commission, exemplary damages may be recovered, if it appears that the act of the company was "a willful violation of the law."—*Augusta Brokerage Co. v. Central of Ga. R. Co.*, 121 Ga. 48, 48 S. E. 714.

[89] Criminal liability — In general.

Prosecution for giving free transportation,—see post, § 33, note [17].

The Elkins Act making it unlawful for a shipper to receive any rebate or concession by any device whatsoever is not confined in its application to cases where the devices used are fraudulent, but refers to any methods whereby a concession is received.—*Armour Packing Co. v. U. S.*, 209 U. S. 56, 28 Sup. Ct. R. (U. S.) 428, affg. s. c. 153 Fed. 1.

There is no provision of the Elkins Act excepting special contracts from its operation.—*Armour Packing Co. v. U. S.*, 209 U. S. 56, 28 Sup. Ct. R. (U. S.) 428, affg. s. c. 153 Fed. 1.

The mere fact that a defendant is a stockholder in a corporation which receives rebates does not subject him to criminal liability.—*U. S. v. Wood*, 145 Fed. 405.

The fact that a shipper who contracts for and receives a rebate, personally derives no benefit therefrom, but turns the same over without consideration to another, does not relieve him from criminal liability.—*U. S. v. Wood*, 145 Fed. 405.

A rebating arrangement was made by the assistant general freight agent. The local freight agent and the agent who made out the bills of lading, knew that there was something unusual and out of the ordinary course of business in such shipments.—*Held*, that this was not sufficient notice to them to make them criminally liable.—*U. S. v. Mich. Cent. R. Co.*, 43 Fed. 26.

Where it is shown that certain companies refused to handle the grain from one elevator upon the same terms that they handled grain from other elevators, their acts being in accordance with contracts between

said companies, in order to render the companies liable for a conspiracy, they must have contemplated discriminating against such elevator owner when they entered into those agreements.—*Kellogg v. Sowerby*, 190 N. Y. 370, 83 N. E. 47, revg. s. c. 114 App. Div. (N. Y.) 916, 100 N. Y. Supp. 1123.

[90] — Elements of the offense.

Intent as element of offense,—see ante, note [17].

An indictment of a shipper for receiving and accepting an unlawful concession from a railroad need not allege payment of the unlawful rate, as *prima facie* the offense is consummated when the property is transported at the unlawful rate.—*U. S. v. Vacuum Oil Co.*, 158 Fed. 536.

A rebate is given and accepted only when the amount thereof is paid.—*U. S. v. Gt. Northern R. Co.*, 157 Fed. 288.

In 1902, prior to the passage of the "Elkins Act" (U. S. Comp. St. Supp. 1907, p. 880; 32 Stat. 847), an agreement was entered into between a shipper and a carrier whereby a certain portion of the published rate was to be refunded. In 1904, subsequent to the passage of that act, the rebate was actually given.—*Held*, that an indictment under the Elkins Act for giving an unlawful rebate was proper.—*U. S. v. Gt. Northern R. Co.*, 157 Fed. 288.

Under the Elkins Act of Feb. 19, 1903, it is not a criminal offense to receive a rebate from a joint rate unless such rate has been both filed and published.—*U. S. v. Wood*, 145 Fed. 405.

When a statute prescribes a penalty for "willful" discriminations by railroads, it is implied that the act must be done knowingly or intentionally.—*Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 3 S. W. 323.

[91] — Each unlawful shipment a separate offense.

Where there are several shipments at a rate less than the legal rate, each shipment is a distinct offense, and the whole transaction does not constitute one continuing offense.—*U. S. v. Vacuum Oil Co.*, 158 Fed. 536; *U. S. v. Cent. Vt. R. Co.*, 157 Fed. 291.

If the offense charged against a railroad is the payment and acceptance of rebates, each substantial payment is properly the subject of a separate indictment or count.—*U. S. v. Gt. Northern R. Co.*, 157 Fed. 288.

Under the Elkins Act of Feb. 19, 1903 (ch. 708, 32 Stat. at L. 847, U. S. Comp. Stat., Supp. 1905, p. 599), each shipment at less than the lawful rate is a separate offense, and where the published rate is on

carload lots, each car is a separate shipment.—*U. S. v. Standard Oil Co.*, 155 Fed. 305.

[92] — Necessity for action by commission.

Section 3 of the Elkins Act, approved Feb. 19, 1903, provides a remedy in court without going before the Interstate Commerce Commission, for any discriminations or preferences forbidden by the Interstate Commerce Act.—*Interst. Com. Commission v. Ch. Gt. W. R. Co.*, 141 Fed. 1003.

A motion was made to dismiss an indictment for unjust discrimination on the ground that the State Commission had filed no information or complaint against the defendant.—*Held*, that the statute is self-operating, and the grand jury may act wholly independent of the Commission.—*Commonwealth v. L. & N. R. Co.*, 112 Ky. 75, 23 Ky. L. R. 1382, 65 S. W. 158.

[93] — Information and evidence.

A shipper charged with having received a rebate from the published rate is not entitled to prove that another carrier has a published rate as low as that which defendant received by means of the rebate.—*U. S. v. Standard Oil Co.*, 155 Fed. 305.

Sufficiency of information and admissibility of evidence, in prosecutions under the Elkins Act for receiving rebates.—*U. S. v. Camden Iron Works*, 150 Fed. 214.

[94] — Indictment.

Indictments for failure to charge the published rate,—see post, § 33, note [10].

An indictment of a shipper under the Elkins Act for receiving a concession from the published rate is not insufficient for failing to allege by what particular device the concession was obtained where it clearly charges every element of the offense and distinctly advises the defendants of what he is to meet at the trial.—*Armour Packing Co. v. U. S.*, 209 U. S. 56, 28 Sup. Ct. R. (U. S.) 428, affg. s. c. 153 Fed. 1.

An indictment against a shipper for receiving a preference in the carriage of goods between two points is not invalid because it fails to charge the particular route over which the goods were transported.—*U. S. v. Vacuum Oil Co.*, 158 Fed. 536.

An indictment under Elkins Act, § 1, charged that in pursuance to an agreement between a shipper and the defendant railroad, certain goods were transported at less than the tariff rates, such result being accomplished by an agreement for rebates from the legal tariff. The indictment also stated that the Missouri Pacific R. Co., whose line formed part of the through route over which the goods were shipped, filed

with the Interstate Commerce Commission a joint tariff of rates and charges.—*Held*, that the indictment did not properly charge an offense by the defendant inasmuch as it failed to allege that a tariff was filed and published by the defendant.—*U. S. v. N. Y. C. & H. R. R. Co.*, 157 Fed. 293.

From a comparison of the numerous counts of an indictment for the giving of rebates, it appeared that the payments of the rebates were in several cases made on the same day.—*Held*, that while if there was actually one payment there would be only one offense, it did not appear from the face of the indictment whether there was in fact only one payment on the one day and a demurrer to such indictment could not be sustained.—*U. S. v. Cent. Vt. R. Co.*, 157 Fed. 291.

A count of an indictment alleging that a carrier "offered, granted and gave" a rebate is not bad for duplicity, as alleging more than one offense.—*U. S. v. D. L. & W. R. Co.*, 152 Fed. 269.

Under the Hepburn Law, it is not sufficient to allege in the indictment that a carrier "unlawfully" gave rebates. The allegation must include that such rebates were "knowingly" given.—*U. S. v. D. L. & W. R. Co.*, 152 Fed. 269.

An indictment for giving rebates, etc., averred that the carrier charged the legal rate, but granted and paid to the shipper a rebate or concession therefrom, whereby it carried the property at less than the legal rate. It did not allege a prior agreement for such rebate, nor did it negative the existence of conditions or circumstances which might make the repayment legal.—*Held*, that this was a valid and sufficient indictment.—*U. S. v. Ch. St. P. & O. R. Co.*, 151 Fed. 84.

A corporation and its agents may be criminally prosecuted for the same offense of giving rebates, in a single indictment.—*U. S. v. N. Y. C. & H. R. R. Co.*, 146 Fed. 298.

An indictment for giving rebates in violation of the Interst. Com. Act, § 2, is bad when it merely alleges the giving of rebates to certain shippers, as it must also give an instance when a like rebate was not given or was refused to some other shipper.—*U. S. v. Hanley*, 71 Fed. 672.

An indictment charging unjust discrimination in rates in violation of Interst. Com. Act, § 2, need not aver by what particular device the defendant managed to discriminate in favor of the particular shipper.—*U. S. v. Tozer*, 37 Fed. 635, 2 L. R. A. 444n.

An indictment for unjust discrimination is defective if it does not allege that the offense was knowingly or wilfully committed.—*Louisville & N. R. Co. v. Commonwealth*, 105 Ky. 179, 20 Ky. L. R. 1099, 48 S. W. 416, 43 L. R. A. 541.

An indictment for unjust discrimination, is defective if it does not allege that the goods were of the same class or kind, handled between the same points, and under substantially similar conditions.—*Louisville & N. R. Co. v. Commonwealth*, 105 Ky. 179, 20 Ky. L. R. 1099, 48 S. W. 416, 43 L. R. A. 541.

An indictment for giving an undue preference is defective where it alleges merely that the defendant made an undue preference by giving H. a free pass, but fails to allege that by virtue of the pass H. received free transportation.—*State v. So. R. Co.*, 125 N. C. 666, 34 S. E. 527.

The allegation in an indictment that a carrier gave a named person an undue preference by transporting him free, alleges discrimination.—*State v. So. R. Co.*, 125 N. C. 666, 34 S. E. 527.

§ 32. Unreasonable preference.—No common carrier shall make or give any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever.

Penalties for unjust discriminations on interstate shipments,—see Elkins Act, § 1, post, Appendix B.

Court proceedings to compel discontinuance of discriminations in interstate traffic,—see Elkins Act, § 3, post, Appendix B.

For discriminations in rates on Interstate shipments,—see Interst. Com. Act, § 2, post, Appendix B.

For similar provisions in the Interstate Commerce Act,—see Interst. Com. Act, § 3, post, Appendix B.

Railroads may not give preference for the transaction of business of common carrier upon its cars or in its depots or on its grounds,—see N. Y. R. R. L., § 34.

Provisions of the New York Railroad Law forbidding discriminations between connecting carriers,—see N. Y. R. R. L. § 35.

Power of former Board of Railroad Commissioners with reference to unjust discriminations,—see N. Y. R. R. L. § 160.

Carriers shall charge rates reasonable in themselves,—see ante, § 26.

Duty of carrier to install switch and sidetrack connections,—see ante, § 27.

Carriers shall not unjustly discriminate as to rates and charges,—see ante, § 31.

Carriers shall not discriminate in facilities between connecting lines,
—see post, § 35.

Carriers shall not subject shippers to prejudice in the distribution of cars,—see post, § 37.

Forfeitures and penalties for giving undue or unreasonable preference or advantage,—see post, § 56.

Statute providing penalties for unjust discrimination construed as penal,—see ante, § 1, note [35].

General rules of statutory construction,—see ante, § 1, notes [23]—[40].

Purpose of acts regulating railroads,—see ante, § 1, note [32].

Who are common carriers,—see ante, § 2, notes [2]—[7].

What constitutes a railroad or street railroad,—see ante, § 2, note [8].

Regulations by Commission to prevent unjust discrimination presumptively reasonable,—see ante, § 23, note [1].

What statutes regulating rates amount to a regulation of interstate commerce,—see ante, § 25, note [14].

Statutes requiring the charging of reasonable rates merely declaratory of common law,—see ante, § 26, note [1].

Provisions of Act applicable to thorough routes as well as single lines,
—see ante, § 26, note [25].

Meaning of term “rate,”—see ante, §§ 26, note [26].

Discretion of carrier in fixing rates,—see ante, § 26, note [28].

Granting of rebates as evidence that rates rebated from are unnecessarily high,—see ante, § 26, note [36].

Issuance of transfers by street railroads,—see ante, § 26, notes [58]—[72].

Presumption of legality of rates filed and posted,—see ante, § 28, note [14].

Statutes forbidding unjust discriminations merely declaratory of common law,—see post, § 31, note [22].

Commodity rates,—see ante, § 31, note [59].

Giving of passes as unjust discrimination,—see post, § 33; note [13].

Discrimination in matter of continuous carriage without breakage of bulk,—see post, § 39, note.

Power of Commission to compel furnishing of facilities,—see post, § 49, note [13].

[1] Rule of equality.

Construction of statutes declaratory of common law,—see ante, § 1, note [31a].

Duty of carriers not to unduly discriminate as to rates,—see ante, § 31, note [1].

“Unlawful discrimination” defined,—see ante, § 31, note [3].

Not all discriminations unlawful,—see ante, § 31, note [4].

Duty of carriers not to discriminate between connecting lines,—see post, § 35, notes [1]–[7].

Duty not to charge more for short than for long haul,—see post, § 36, notes [4], [5].

Duty of carrier not to discriminate in furnishing cars,—see post, § 37, note [9].

Effect of agreement on duty of carrier not to discriminate in furnishing cars,—see post, § 37, note [12].

The provision in the Constitution of Colorado that “no railroad company shall give any preference to individuals, associations or corporations in furnishing cars or motive power” imposes no greater obligation on a carrier than the common law imposed.—*Atchison, T. & S. F. R. Co. v. D. & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. R. (U. S.) 185, revg. s. c. 13 Fed. 546.

A railroad company owes the duty to shippers not to unreasonably and unduly discriminate against them in favor of other shippers.—*U. S. v. Oregon R. & N. Co.*, 159 Fed. 975.

A carrier cannot discriminate between persons who tender freight for transportation.—318½ *Tons of Coal*, 14 Blatch. (U. S.) 453.

A carrier who under any pretext whatever grants to one shipper an advantage which it denies to another violates the spirit and thwarts the purpose of the law.—*Castle v. B. & O. R. Co.*, 8 Inters. Com. R. 333.

At common law, and also under the N. Y. Railroad Law, a carrier could not unreasonably or unjustly discriminate between persons whose property was offered for transportation, but was bound to deal with them all substantially alike.—*People ex rel. Ohlen v. N. Y. L. E. & W. R. Co.*, 22 Hun (N. Y.), 533.

A railroad company, where it acts as a common carrier, is bound to serve alike all the members of the public who apply for service under like conditions.—*State v. Atlantic C. L. R. Co.*, 51 Fla. 543, 41 So. 528.

In matters as to the management of its property and involving no duty to the public, a carrier may grant concessions to some which it withholds from others, especially if such a course is beneficial to the public.—*Kates v. Atlanta Cab Co.*, 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431.

A railroad is without power to enter into a preferential or exclusive contract with any of its patrons.—*L. & N. R. Co. v. Central Stock Yards Co.*, 30 Ky. L. R. 18, 97 S. W. 778.

Carriers cannot legally give undue and unjust preferences.—*New Eng. Exp. Co. v. Me. C. R. Co.*, 57 Me. 188.

Terms imposed by railroads for trackage to warehouses near stations must be the same for all, even though warehouses are on the carrier's

right of way.—*Farwell F. W. Assn. v. Minneapolis, St. P. & S. St. M. R. Co.*, 55 Minn. 8, 56 N. W. 248.

A carrier is required to provide facilities for and to receive and ship goods tendered at its stations on payment or tender of the usual tariff rates and may not discriminate between shippers.—*State ex rel. Crandall v. C. B. & Q. R. Co.*, 72 Neb. 542, 101 N. W. 23; *State ex rel. McComb v. C. B. & Q. R. Co.*, 71 Neb. 593, 99 N. W. 309.

A common carrier cannot exercise an unreasonable discrimination in the carriage of goods.—*McDuffee v. Portland & R. R. Co.*, 52 N. H. 430.

A car switching company must not discriminate between shippers.—*Larrabee Flour Mills v. Mo. Pac. R. Co.*, 74 Kan. 808, 88 Pac. 72.

A carrier must not use its powers to benefit one community, industry or individual to the detriment of another.—*Houston & T. C. R. Co. v. Smith*, 63 Tex. 322.

[2] Legislative control.

General power to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

The provisions of Inters. Com. Act. § 3, as to undue advantage or prejudice, etc., apply to discrimination in facilities or instrumentalities of transportation, and give the Interstate Commerce Commission jurisdiction of any case of wrongful prejudice arising in connection therewith.—*Red Rock F. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 438.

The legislature may prohibit unjust discriminations, as to localities, in charges for the transportation of persons and freights.—*Chicago & A. R. Co. v. People*, 67 Ill. 11.

A Kentucky statute making it unlawful for any corporation to give “any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic,” etc. is void for uncertainty.—*Commonwealth v. L. & N. R. Co.*, 20 Ky. L. R. 491, 46 S. W. 700; *Louisville & N. R. Co. v. Commonwealth*, 99 Ky. 132, 35 S. W. 129.

Under a statute prohibiting carriers from giving any undue or unreasonable advantage, etc., the power of the Railroad Commission is not confined to prevent such preferences, etc. in rates, but in any respect pertaining to their functions as common carriers.—*R. R. Commission v. H. & T. C. R. Co.*, 90 Tex. 340, 38 S. W. 750.

A statute making a carrier who forwards goods of a favored shipper out of the order in which they are received, liable for all losses resulting from the delay, and also for statutory penalties, is valid.—*Hill & M. V. St. Louis S. W. R. Co.*, 7 Tex. Ct. R. 336, 812, 75 S. W. 874.

[3] Who may complain.

The Interst. Com. Act, § 3, forbidding discrimination between persons and localities, is available only to the persons or localities discriminated against, and a connecting railroad cannot complain of another railroad because the latter discriminates against localities in compelling prepayment of freight and car mileage on traffic brought over the connecting carriers' line from certain localities, while not compelling prepayment of freight and car mileage on traffic brought over such line from other localities.—*Oregon S. L. & U. N. R. Co. v. No. Pac. R. Co.*, 61 Fed. 160, affg. s. c. 51 Fed. 465.

[4] Necessity for tangible injury.

In cases of discrimination on rates,—see ante, § 31, note [6].

That the community discriminated against is not directly injured does not justify an undue preference.—*Kindell v. A. T. & S. F. R. Co.*, 8 Inters. Com. R. 608.

The mere fact that a contract has been entered into between a canal company and a coal company which will give a preference to the coal company over other shippers to the extent of one half the capacity of the canal, is no ground for an information in the nature of *quo warranto* in the absence of a showing that the rights of other shippers have actually been interfered with.—*Commonwealth v. D. & H. Canal Co.*, 43 Pa. St. 295.

[5] Presumption and burden of proof.

The burden of proving undue preference or undue prejudice is on the complaining party.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

Discriminations against shippers must be considered unjust, unless forced by justifying conditions, and the burden is on the complainant to show the discrimination, and on the carrier to show that the discrimination was justified.—*Richmond Elev. Co. v. Pere Marquette R. Co.*, 10 Inters. Com. R. 629.

[6] Different circumstances and conditions as justification.

As justification for discriminations in rates,—see also, ante, § 31, notes [32]–[55].

What are "contemporaneous shipments,"—see ante, § 31, note [41].

The law imposes the duty upon carriers not to unreasonably discriminate between persons, localities or forms of traffic, but a dissimilarity of circumstances and conditions may justify a discrimination.—*U. S. v. Oregon R. & N. Co.*, 159 Fed. 975.

Population and tonnage traffic are differences which may be constituted "circumstances and conditions" of dissimilarity; and it can not be said as a matter of law, that a carrier may not lawfully collect and deliver goods, at its own expense, in a city of 70,000 population and 1,000,000 ton traffic, and not in a city of 6,000 population and 55,000 ton traffic.—*Detroit, G. H. & M. R. Co. v. Interst. Com. Commission*, 74 Fed. 803, revg. s. c. 57 Fed. 1005; affd. 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986.

Differences in facilities furnished under essentially different circumstances do not constitute undue or unjust discrimination.—*Little Rock & Ft. S. R. Co. v. Oppenheimer*, 64 Ark. 271, 43 S. W. 150, 44 L. R. A. 353.

[7] Matters relevant in determining question of undue preference.

In considering whether any particular locality is subjected to an undue preference or disadvantage, all the facts and circumstances must be considered, the welfare of the communities to receive and consume the goods as well as the communities producing and shipping them; the legitimate interests of the carriers as well as the traders and shippers; the competition between routes for traffic, etc.—*Texas & P. R. Co. v. Interst. Com. Commission*, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666, revg. s. c. 57 Fed. 948, affg. s. c. 52 Fed. 187.

Location of freight stations, facilities afforded by rival carriers, the state of existing competition, are circumstances to be considered in determining what accessorial services a carrier may furnish, without unjustly discriminating.—*Detroit, G. H. & M. R. Co. v. Interst. Com. Commission*, 74 Fed. 803, revg. s. c. 57 Fed. 1005; affd. 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986.

When the Interstate Commerce Act says that no locality shall be subjected to any undue prejudice or disadvantage, it does not mean that regard is to be had solely to the welfare of the locality where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also to enter into the question.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 74 Fed. 715.

In passing upon any question of undue preference or disadvantage, it is proper to take into account various elements, such as the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services, the profit to the company, and the situation and circumstances of the respective patrons, with reference to each other, as competitive or otherwise.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

[8] Intervention by commission.

The Interstate Commerce Commission should not interfere with the adjustment of rates between localities except when necessary to protect public interests. To justify the intervention of the Commission, it must appear that the preference and advantage in the one case, and the corresponding prejudice and disadvantage in the other, are so appreciable and established with such a degree of certainty as to be justly declared unreasonable.—*Commercial Club of Omaha v. Ch. & N. R. Co.*, 7 Inters. Com. R. 387.

The Interstate Commerce Commission will not decide, on an *ex parte* application, whether railroads ought to grant a particular special privilege of manufacturing in transit, etc.—*In re Iowa Barb Steel Wire Co.*, 1 Inters. Com. R. 21, 605, 1 I. C. C. R. 17.

[9] General rules and principles.

It may be presumed that Congress, in adopting substantially the language of the English Act, had in mind the construction given to the words "undue preference" by the courts of England.—*Interst. Com. Commission v. B. & O. R. Co.*, 145 U. S. 263, 12 Sup. Ct. R. (U. S.) 844, affg. s. c. 43 Fed. 37; *Interst. Com. Commission v. Ch. G. W. R. Co.*, 141 Fed. 1003.

There is no distinction in principle between a discrimination in the furnishing of facilities with which to originate a shipment, and a discrimination in the furnishing of facilities with which to receive a shipment.—*Rogers v. Phila. & R. R. Co.*, 12 Inters. Com. R. 352.

Discrimination may arise in the delivery of goods as well as in the receipt or transportation.—*St. Louis Hay & G. Co. v. C. B. & Q. R. Co.*, 11 Inters. Com. R. 82.

A preference or advantage in rates or service is not unlawful under Interst. Com. Act, § 3, unless it results from the wrongful action of the carrier.—*Wilmington T. Assn. v. Cincinnati P. & V. R. Co.*, 9 Inters. Com. R. 118.

Because one railroad violates the Interstate Commerce Act in one particular does not justify another in violating it openly in another particular.—*In re Atchison T. & S. F. R. Co.*, 7 Inters. Com. R. 61.

A given relation in rates between competing towns, fairly equitable at the time of its adoption, may become, through business development and changes in other conditions, severely prejudicial to the town taking the higher schedule.—*Daniels v. Ch. R. I. & P. R. Co.*, 6 Inters. Com. R. 458.

The English cases are valuable in defining what constitutes undue preference or prejudice, etc., but their value is greatly limited in cases where the statute itself describes the offense it declares unlawful.—

R. R. Commission of Ga. v. Clyde Ss. Co., 4 Inters. Com. R. 120, 5 I. C. C. R. 324.

Discrimination must consist in the doing for or allowing to one party or place what is denied to another; it cannot be predicated of action which is in itself impartial.—*Crews v. Richmond & D. R. Co.*, 1 Inters. Com. R. 490, 703, 1 I. C. C. R. 401.

A railroad may engage in furnishing accessorial service to consignors or consignees, but they cannot monopolize, wholly or partly, this accessorial business, or promote the monopoly of it by anyone else, or appropriate preferential advantages for conducting it, to their own profit or that of anyone else.—*Camblos v. Philadelphia R. Co.*, Fed. Cases 2331.

A carrier has the right to prescribe such reasonable rules and regulations as are deemed best calculated to promote its own interests and those of shippers.—*Pennsylvania Coal Co. v. D. & H. Canal Co.*, 31 N. Y. 91, affg. 29 Barb. (N. Y.) 589.

Making a special contract to convey a commodity renders a railroad a common carrier of that commodity, bound to render reasonable and equal facilities for all of such commodity offered for transportation.—*Baker v. Boston & M. R. Co.*, — N. H. —, 65 Atl. 386.

[10] Effect of competition.

Competition is a factor to be considered under Interst. Com. Act, § 3.—*East Tennessee, V. & G. R. Co. v. Interst. Com. Commission*, 181 U. S. 1, 21 Sup. Ct. R. (U. S.) 516; *Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45, affg. s. c. 74 Fed. 715, 69 Fed. 227; *Interst. Com. Commission v. Ch. W. R. Co.*, 141 Fed. 1003; *Interst. Com. Commission v. Clyde Ss. Co.*, 93 Fed. 83.

In interpreting and applying Interst. Com. Act, § 3, competition between rival routes does not necessarily relieve the carrier of the restraints imposed by the section, but it is to be considered in determining what constitutes "undue or unreasonable preference or advantage." The competition may be such that, out of due regard for the interests of the public and the carriers, it ought to be permitted to influence rates, and there is no rule which prevents the Interstate Commerce Commission or the courts from taking it into consideration.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. 45, affg. s. c. 74 Fed. 715, 69 Fed. 227.

Conditions of water and trunk line competition considered, under Interst. Com. Act, § 3.—*Interst. Com. Commission v. Cincinnati, P. & V. R. Co.*, 124 Fed. 624.

The fact that competition results in placing one shipping point at a disadvantage with another does not make a case of discrimination.—*Allen & Lewis v. Ore. R. & N. Co.*, 98 Fed. 16; *Savannah Bureau v. Charleston & S. R. Co.*, 7 Inters. Com. R. 458.

The advantageous position of one trader in having his establishment so located that he has two competing routes is as much a circumstance to be considered as the geographical location of another shipper, who though he has not the advantage of competition between routes is situated at a point on the line physically nearer the common market.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

In the distribution of cars, a carrier may not discriminate between competitive and non-competitive points.—*Hawkins v. L. S. & M. S. R. Co.*, 9 Inters. Com. R. 207; *Hawkins v. Wheeling & L. E. R. Co.*, 9 Inters. Com. R. 212.

Under Interst. Com. Act, § 3, the question is not merely whether some form of competition exists at the favored point which is not found at the other, but rather do all the circumstances and conditions, taking into consideration the interests of all the parties, excuse the preference.—*Holdzkorn v. Mich. Cent. R. Co.*, 9 Inters. Com. R. 42.

That one city is larger, with more business, etc., and hence the competition between carriers is keener there than at another city served by the same railroad, is not a condition of competition which necessarily justifies a disparity in rates.—*Holdzkorn v. Mich. Cent. R. Co.*, 9 Inters. Com. R. 42.

When a common carrier has established a business, it may retain it by the use of all lawful means. The means here adopted for this purpose was to offer the service to the public at a loss to themselves whenever competition was to be met, and when it disappeared, to resume the standard rates, which did not at any time exceed a reasonable and fair charge. There is nothing unlawful or against the public good in seeking by such means to retain a business which it does not appear was of sufficient magnitude to furnish employment for more than one line.—*Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, affg. s. c. 68 Hun (N. Y.), 486, 22 N. Y. Supp. 976.

[11] Delay as discrimination.

Delay in shipment may be discrimination.—*Gulf, C. & S. F. R. Co. v. Lone Star Co.*, 26 Tex. Civ. App. 531, 63 S. W. 1025.

[12] Discriminations between localities in general.

Arbitrariness and differentials,—see ante, § 31, note [60].

Group rates and basing points,—see ante, § 31, note [61].

It is competent for a railroad to advance its own interest to the extent of building up a seaport on its own line at the expense of another port on a rival line, but it cannot, for this purpose, adopt rates, excessive in themselves, unduly preferential to its own port and unduly prejudicial to the other.—*Interst. Com. Commission v. L. & N. R. Co.*, 118 Fed. 613.

Rate adjustments between localities cannot be made with reference to cost of power, fuel, labor, etc. in the respective communities.—*Matter of Rates on Corn & Corn Products*, 11 Inters. Com. R. 212.

A carrier cannot, by a manipulation of billing, neutralize the advantage which one community has by reason of its favorable location.—*Cannon Falls Elev. Co. v. Ch. G. W. R. Co.*, 10 Inters. Com. R. 650.

Carriers must not favor one city above another simply because it is stronger and more influential.—*Holdzkom v. Mich. Cent. R. Co.*, 9 Inters. Com. R. 42.

It is an unlawful system of rate-making which enables merchants of one town to compete with merchants of another at their own doors on equal terms, but debars the latter from such competition with the former.—*Board of Trade v. Nashville, C. & St. L. R. Co.*, 8 Inters. Com. R. 503.

A carrier must recognize the geographical position and commercial importance of a city on its line, and cannot use its powers to deprive that community of the competitive advantages which the enterprise of its citizens has secured.—*Danville v. So. R. Co.*, 8 Inters. Com. R. 409.

That a carrier can get reshipments from the favored locality and not from the other, does not justify it in making a rate to one competing locality which gives the former a practical monopoly over the latter.—*Savannah Bureau v. L. & N. R. Co.*, 8 Inters. Com. R. 377.

A carrier cannot be compelled, in rate-making, to ignore distance in order to place two communities on a commercial equality.—*N. Y. Prod. Exch. v. B. & O. R. Co.*, 7 Inters. Com. R. 612; *Savannah Bureau of F. & T. v. Charleston & S. R. Co.*, 7 Inters. Com. R. 458.

Not every inequality in rates between localities is a preference or prejudice, nor is every preference or prejudice undue.—*Commercial Club of Omaha v. Ch. & N. W. R. Co.*, 7 Inters. Com. R. 387.

That a railway cannot earn a proper return without discriminating between localities does not justify such discrimination.—*Brewer v. L. & N. R. Co.*, 7 Inters. Com. R. 224.

In fixing rates, carriers have no right to disregard distance and natural advantages in order to bring about a commercial equality.—*Commercial Club of Omaha v. Ch. R. I. & P. R. Co.*, 6 Inters. Com. R. 647; *Colorado F. & I. Co. v. So. Pac. Co.*, 6 Inters. Com. R. 488; *James v. C. P. R. Co.*, 4 Inters. Com. R. 45, 110, 274, 5 I. C. C. R. 612; *Eau Claire v. Ch. M. & St. P. R. Co.*, 3 Inters. Com. R. 174, 314, 4 Inters. Com. R. 65, 5 I. C. C. R. 264.

Each locality competing with others in a common market is entitled to reasonable and just rates at the hands of the carriers serving it and to the benefit of all its natural advantages.—*Freight Bureau v. C. N. O. & T. P. R. Co.*, 6 Inters. Com. R. 195.

A town less favorably situated than its competitor, which is located on a through line, is not entitled to a local rate from such town to the through line so low as to overcome the more advantageous location of its competitor.—*Chamber of Commerce of M. v. Great Northern R. Co.*, 4 Inters. Com. R. 44, 230, 5 I. C. C. R. 571.

Relatively less rates per ton per mile on freight from places more remote from the common market, are not justified to overcome the natural transportation advantages of one community and thereby enable others to compete with it in such market.—*Chamber of Commerce v. Gt. Northern R. Co.*, 4 Inters. Com. R. 44, 230, 5 I. C. C. R. 571.

A railroad cannot discriminate against a town it does not reach and in whose traffic it does not participate.—*Eau Claire v. Ch. M. & St. P. R. Co.*, 3 Inters. Com. R. 174, 314, 4 Inters. Com. R. 65, 5 I. C. C. R. 264.

Carriers cannot adjust their rates so as to keep a great staple industry, like that of raising pork and making its products, in one locality or region, even though great capital is invested in that industry there.—*Chicago Board of Trade v. Ch. & A. R. Co.*, 2 Inters. Com. R. 410, 505, 3 Inters. Com. R. 233, 284, 4 I. C. C. R. 158.

If carriers give to small towns rates as favorable as to the larger, the Interstate Commerce Commission will not interfere.—*Martin v. C. B. & Q. R. Co.*, 2 Inters. Com. R. 32, 2 I. C. C. R. 25.

A carrier acquiring and operating different competing lines cannot discriminate between localities or its patrons by making different tariffs for the several divisions.—*Rice v. W. N. Y. & P. R. Co.*, 1 Inters. Com. R. 717, 792, 795, 811, 2 Inters. Com. R. 298, 4 I. C. C. R. 131.

That a carrier operates parallel lines and adopts low rates for one of them, requires similar concessions to persons shipping over the other line, that the locality along such line may not be subjected to undue disadvantage.—*Boards of Trade v. Ch. M. & St. P. R. Co.*, 1 Inters. Com. R. 608, 1 I. C. C. R. 215.

If a railway, in establishing its charges on the different divisions of its road, so adjusts them as to divert trade and business to one locality which naturally, under an equitable adjustment of charges, would go to another, such unreasonable preference for one place and disadvantage for another are not excused by the fact that some of such rates are not entirely voluntary, but the result of competition with other carriers.—*Raymond v. Ch. B. & Q. R. Co.*, 1 Inters. Com. R. 592, 1 I. C. C. R. 230.

In a statute prohibiting discrimination against any locality, there is no restriction on the word "locality," and it may refer to a village,

city, county, or portion of the state, the meaning in each case to be determined by the territory which shall be found to have been discriminated against.—*State v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313, 35 N. W. 118.

[13] Forwarding out of order of receipt.

Forwarding goods of one shipper out of the order in which they were received may constitute an unlawful preference.—*Hill & M. v. St. Louis S. W. R. Co.*, 7 Tex. Ct. R. 336, 812, 75 S. W. 874.

[14] Preference to shipments of perishable property.

The anthracite coal strike caused an unprecedented use of defendant's lines for carrying bituminous coal east for industrial and domestic purposes.—*Held*, that the defendants probably had the right to give such freight a preference over hay, even issuing an embargo against articles like hay, and it was not improper that live stock, perishable freights, and material or supplies for the railroad should be exempted from any embargo imposed.—*Daish v. Cleveland, A. & C. R. Co.*, 9 Inters. Com. R. 513.

When a carrier is unable to immediately transport all property delivered to it for carriage, he may, and it is his duty to, give preference to that which is perishable.—*Tierney v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 305, affg. s. c. 10 Hun (N. Y.), 569, 67 Barb. (N. Y.) 538.

[15] Refusal to transport.

Duty of carrier to transport,—see ante, § 26, note [11].

It is not an unjust discrimination against any locality for an express company to refuse to receive currency for shipment at that point in cases where it will be necessary to keep the same in the express office over night, where it appears that the same rule is in force in forty-one other stations similarly situated.—*Platt v. Le Cocq*, 158 Fed. 723.

A railroad cannot refuse to transport coal tendered by a shipper on the ground that it is of inferior quality to other coal also produced along its line, and that the marketing of the inferior coal will seriously affect the sale and consequently the shipment of the superior quality.—*Olanta Coal Co. v. Beach Creek R. Co.*, 144 Fed. 150.

Under the Interstate Commerce Act as amended, common carriers subject thereto cannot lawfully refuse transportation as therein defined, but must upon reasonable request afford the same upon established rates filed and kept posted as required by law. The purposes of the law cannot be defeated by the failure of carriers to include in their schedules and to keep posted the rates for the entire service rendered,

for example for both transportation proper and refrigeration, which under the law they are bound to provide.—*Waxelbaum v. Atlantic C. L. R. Co.*, 12 Inters. Com. R. 205.

A rule of an express company provided: "Agents at common points must decline to accept for transportation business originating at their offices, destined to exclusive offices of other companies having offices at points of origin." This rule was amended by adding the following: "Provided, however, that the said shipment shall not be refused if the shipper insists upon forwarding it and tenders the agent the full amount necessary to pay the charges of this company in advance, at its regular local rate, to the point of transfer to the connecting company," etc.—*Held*, that the rule is open to serious objection, inasmuch as it is not only contradictory in its terms, but is certain in practice to have discriminating effect as between shippers who insist upon the transportation, notwithstanding the agent's refusal, and shippers who do not insist upon the transportation after the agent shall have refused the shipments.—*Herendeen v. U. S. Exp. Co.* Decided by the N. Y. Public Service Commission of the Second District, February 18, 1908.

An express company refused to accept and carry certain fragile goods unless the shipper would accept a receipt limiting the company's liability for breakage, etc.—*Held*, mandamus will not be granted to compel the carrier to carry the goods, subject to all the common law liabilities of a common carrier.—*People ex rel. Walker v. Babcock*, 16 Hun (N. Y.), 313.

Where a railroad is under the military control of the government for a period, it cannot be held liable for refusing freights when it would not be safe to undertake their carriage, or for discrimination in consequence of military orders.—*Phelps v. Ill. Cent. R. Co.*, 94 Ill. 548.

A railroad incurs no liability for refusing to receive goods, where, by reason of unusual pressure of business, it has not facilities for handling all freight which is tendered.—*Louisville & N. R. Co. v. Queen City Coal Co.*, 99 Ky. 217, 18 Ky. L. R. 126, 35 S. W. 626.

When a carrier has furnished itself with the appliances necessary to transport the amount of freight which may, in the usual course of events, be reasonably expected to be offered to it for carriage, taking into a consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may only occur in a given locality temporarily, or at long intervals of time.—*State ex rel. Crandall v. C. B. & Q. R. Co.*, 72 Neb. 542, 101 N. W. 23; *State ex rel. McComb v. C. B. & Q. R. Co.*, 71 Neb. 593, 99 N. W. 309.

[16] Consideration of amount shipped.

That the carrier could transport more coal to market if it could concentrate the shipping points and confine the business to large shippers, does not excuse undue prejudice in the matter of facilities.—*Red Rock F. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 438.

[17] Consideration of extent of patronage of shipper.

That a shipper is a regular patron of the carrier does not justify giving him preference in the use of equipment, etc.—*Riddle v. N. Y. L. E. & W. R. Co.*, 1 Inters. Com. R. 787, 1 I. C. C. R. 594

A railroad is not justified in refusing equal facilities to the owners of a mine merely because such owners also ship coal over another road.—*Chicago & A. R. Co. v. Suffern*, 129 Ill. 274, 21 N. E. 824.

[18] Giving of special privileges or facilities.

Elevation of grain not interstate commerce,—see ante, § 25, note [5].

Icing and refrigeration of cars for interstate transportation is interstate commerce,—see ante, § 25, note [6].

Wharfage not interstate commerce,—see ante, § 25, note [6].

Duty of carrier as to icing and refrigeration,—see ante, § 26, note [18].

Duty of carrier to furnish terminal facilities,—see ante, § 26, note [18].

Duty of carrier to publish charges for special services,—see ante, § 28, notes [19], [21].

Party-rate tickets must be available to all persons,—see post, § 33, note [20].

The assumption by the carrier of the cost of getting the shipper's property to the carrier's rails—a substantial consideration not mentioned in or contemplated by, the published schedules—is unlawful, under the Interstate Commerce Act.—*U. S. v. Chicago & A. R. Co.*, 148 Fed. 646.

The existence for a long time before the passage of the Interstate Commerce Act, of a custom to collect and deliver freight by the carrier in one city, and not in others, may be one of the "circumstances" mentioned in the Act as elements in determining whether there has been unjust discrimination.—*Detroit, G. H. & M. R. Co. v. Interst. Com. Commission*, 74 Fed. 803, revg. s. c. 57 Fed. 1005; affd. 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986.

The fact that a carrier, in his schedule of freight rates, groups together two cities on its line, some distance apart, and charges the same for transportation to both, is not to be treated as a conclusive admission that the service is performed under substantially similar

circumstances and conditions, within the meaning of the Interstate Commerce Act, so as to make it necessarily unlawful to furnish, without extra charge, an additional service at one city, by cartage from its depot to consignee's place of business.—*Detroit, G. H. & M. R. Co. v. Interst. Com. Commission*, 74 Fed. 803, revg. 57 Fed. 1005; affd. 167 U. S. 633, 17 Supp. Ct. R. (U. S.) 986.

Where a carrier announces a system which permits compression of cotton in transit at the nearest point, it cannot allow favored shippers to depart from that rule, and thereby gain an advantage withheld from others.—*Muskogee Club v. Mo. K. & T. R. Co.*, 12 Inters. Com. R. 356.

The compression of cotton is not a matter with which a railroad may deal entirely as it sees fit, and without respect to the effect its practices may have upon the transportation of cotton. Either the carrier must publish a rate upon "flat" cotton and another rate upon compressed cotton, and divorce itself from the matter of compression, or else such compression as is given by the railroad becomes subject to the Interstate Commerce Commission.—*Muskogee Club v. Mo. K. & T. R. Co.*, 12 Inters. Com. R. 356.

Where a railroad has established a "parcels express" for the convenience of persons living in suburban towns, in order to stimulate suburban travel, it is an unjust discrimination to refuse the privileges of this service to one person while according the same to the public generally.—*Walker v. B. & O. R. Co.*, 12 Inters. Com. R. 225.

A carrier should not furnish at any point any elevator allowance or free service in connection with the elevation, transfer, mixing, cleaning, clipping, drying, weighing, storage, loading out or shipment of grain which is not furnished at the same time to the same degree and extent at any other common point in rate-making.—*City Council v. Mo. Pac. R. Co.*, 12 Inters. Com. R. 127.

Elevation must be open to all shippers on equal and reasonable terms.—*Allowances to Elevators by U. Pac. R. Co.*, 12 Inters. Com. R. 99.

A carrier may unload for consignees at the destination if it does so for all shippers alike.—*Allowances to Elevators by U. Pac. R. Co.*, 12 Inters. Com. R. 99.

Carriers may not discriminate between markets or individuals in granting the privilege of stopping a commodity in transit for the purpose of treatment or reconsignment.—*St. Louis Hay & G. Co. v. Mobile & O. R. Co.*, 11 Inters. Com. R. 90.

Shippers are not entitled as a matter of right to mill grain in transit and forward all the milled product under the through rate in force on the grain from the point of origin to the place of ultimate destination, but allowance of the privilege by a carrier to shippers in one section must be without wrongful prejudice to the rights of shippers in an-

other section served by its line.—*Koch v. Pa. R. Co.*, 10 Inters. Com. R. 675.

The privilege of stop-over in transit for cleaning, sacking, etc., with privilege of reshipment at a proportional of the through rate, must not be used as a means of secret discrimination or open prejudice.—*Matter of Rates & Practices of Mobile & O. R. Co.*, 9 Inters. Com. R. 373.

A common carrier is not legally obligated to furnish the same terminal facilities for all descriptions of traffic.—*Palmers' Board of Trade v. Pa. R. Co.*, 9 Inters. Com. R. 61.

A carrier may not regard lighterage service, for avoidance of breaking of bulk, as part of the through transportation to more distant points and not to an intermediate point, the carriage to both places being through and continuous.—*Warren-Ehret Co. v. Cent. R. Co. of N. J.*, 8 Inters. Com. R. 598.

Allowance of a longer time before demurrage charges begin, at one point than at another, may be an undue preference.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

Allowance of free car service is not an unlawful discrimination, unless more is permitted to one shipper of the same commodity than to another.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

The practice of "floating cotton" is advantageous to the carrier and shipper, and tends to equalize differences in rates between non-competitive and competitive points. It cannot be held a discrimination against dealers who decline to take advantage of the privilege.—*Unlawful Rates in Trans. Cotton by K. C., M. & B. R. Co.*, 8 Inters. Com. R. 121.

Making the milling in transit rate at a given point $2\frac{1}{2}$ cents above the through rate on wheat is not necessarily an undue prejudice.—*Listman Mill Co. v. Ch. M. & St. P. R. Co.*, 8 Inters. Com. R. 47.

If a railroad undertakes to render particular services to one corporation, it can not lawfully refuse to render similar services to all under like circumstances, upon payment of like compensation.—*State v. Atlantic C. L. R. Co.*, 51 Fla. 578, 40 So. 875.

Under a special contract, a railroad renders transportation services for a telegraph company which it is not required to do by its function as a common carrier. It refuses to render similar services for another telegraph company.—*Held*, such refusal is an unjust discrimination, which the railroad commissioners may investigate and prevent.—*State ex rel. Ellis v. Atlantic C. L. R. Co.*, — Fla. —, 41 So. 705.

A "rebilling" rate, to receive the sanction of the law, must operate uniformly and fairly, and must be open to all shippers alike. It can-

not be lawfully restricted to shippers who live in a certain locality, and who previously receive freight over the line of a certain other favored associated carrier.—*Alabama & V. R. Co. v. R. R. Commission*, 86 Miss. 667, 38 So. 356.

A railroad company must either provide tank-cars for all persons shipping oil, or give such rates for shipments in barrels by the car-load, as will place its customers using that method on an equal footing with customers adopting the other method.—*State v. C. N. O. & T. P. R. Co.*, 47 Oh. St. 130, 23 N. E. 928, 7 L. R. A. 319n.

A railroad cannot refuse to accommodate all newspaper publishers on a special train, for which one of them had specially contracted. It is not a defense that any other publisher is free to make the same arrangements for a special train.—*Memphis News Pub. Co. v. So. R. Co.*, 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150.

Gratuitous carting, loading, etc., of the goods of one shipper and not of another is an undue preference.—*Evershed v. London & N. W. R. Co.*, L. R. 2 Q. B. D. 254.

[19] Extending facilities to express companies.

Carriers are not bound to extend equal facilities to all express companies desiring to operate over their lines.—*The Express Cases*, 117 U. S. 1, 6 Sup. Ct. R. (U. S.) 542, 628, revg. 10 Fed. 210, 869, overruling 2 Fed. 465, 18 Fed. 517; *Pfister v. Cent. Pac. R. Co.*, 70 Cal. 169, 11 Pac. 686.

A contract to furnish such an excessive and unnecessary amount of space, in the cars of a railroad, for one express company, as will prevent such carrier from serving others equally entitled to be served, is void.—*Texas Exp. Co. v. Tex. & P. R. Co.*, 6 Fed. 426; *Sandford v. C. W. & E. R. Co.*, 24 Pa. 378.

Express companies are not, through any present magnitude or prospective expansion of their business, entitled to any such preferential facilities or accommodations from a railroad company as would preclude or impede participation by the railroad company or by any of the public in conducting such business with equal advantage on any scale, large or small.—*Camblos v. Phila. & R. R. Co.*, Fed. Cases, No. 2,331.

Special contracts between a carrier and express companies, giving special and exclusive privileges to the latter, are lawful.—*Blank v. Ill. Cent. R. Co.*, 80 Ill. App. 475; *affd.* 182 Ill. 332; *Louisville, N. & C. R. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93; *Pittsburg, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101.

A street railway authorized to do an express business may give exclusive facilities to a single express company, if it does not thereby

deprive the public of reasonable express service.—*Dulaney v. United R. & Elect. Co.*, — Md. —, 65 Atl. 45.

A carrier cannot be compelled to furnish special facilities to an expressman to enable him to carry on his business as expressman over such carrier's lines.—*Sargent v. Boston & L. R. Co.*, 115 Mass. 416.

A carrier cannot give one express company an exclusive privilege, as against another.—*New Eng. Exp. Co. v. M. C. R. Co.*, 57 Me. 188; *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430.

[20] Preference in grants of right to do business on carrier's premises.

A railroad may make an exclusive arrangement with one cab company.—*Donovan v. Pa. R. Co.*, 199 U. S. 279, 26 Sup. Ct. R. (U. S.) 91.

It is not a discrimination for a carrier which has established on its property an agency to deliver the baggage of passengers, to prevent persons coming on such property to solicit or receive orders in competition with such agency. — *Barney v. Oyster Bay S. Co.*, 67 N. Y. 301, affg. s. c. 2 T. & C. (N. Y.) 598.

N. Y. R. R. L., § 34, forbidding a railroad from giving a preference on its grounds to one of two or more persons competing in the same business, applies only to persons having contractual relations with the company.—*New York C. & H. R. R. Co. v. Warren*, 31 Misc. (N. Y.) 571, 64 N. Y. Supp. 781.

A railroad may give a hackman an exclusive right of going on its premises, soliciting and carrying away incoming passengers.—*New York C. & H. R. R. Co. v. Warren*, 31 Misc. (N. Y.) 571, 64 N. Y. Supp. 781.

A depot corporation cannot prohibit all public cabs except of one corporation, from standing and soliciting business on the former's grounds before the entrance to its depot.—*Indianapolis U. R. Co. v. Dohn*, 153 Ind. 10, 53 N. E. 937, 45 L. R. A. 427.

In an action in trespass by a railroad against a hackman for soliciting business on the company's premises, the validity of a contract between the company and a third person giving the latter exclusive hackman's privileges, cannot be brought into issue by the defendant.—*New York, N. H. & H. R. Co. v. Bork*, 23 R. I. 218, 49 Atl. 965.

[21] Routing of shipments.

Reservation by carrier of right to route goods,—see ante, § 28, note [28].

Routing of goods as discrimination between connecting carriers,—see post, § 35, note [25].

The giving of instructions by the shipper relieves the carrier of obligation to forward by the cheaper route, or do anything as to such route,

etc., except to obey instructions.—*Dewey Bros. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 481.

In the absence of instructions from the shipper, it is the duty of the receiving carriers not only to charge the lowest combination of rates between given points but to give the shipper the advantage of the shorter route and lower rate.—*Dewey Bros. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 481.

If the carrier, contrary to the instructions of the shipper, takes the responsibility of routing the car by indirect, expensive lines instead of by the obvious, direct and cheaper route, or without any instructions so routes the car as to burden the shipper with the needless expense of the longer route, such action is *prima facie* unjust and unreasonable, and unless affirmatively justified warrants an order of reparation.—*Dewey Bros. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 481.

Initial carriers may not reserve to themselves the exclusive right to route goods beyond their own lines.—*Consolidated F. Co. v. So. Pac. R. Co.*, 9 Inters. Com. R. 182.

The practice of the initial carriers in joint routes, of reserving exclusive control of the routing of goods and denying the shipper any choice between established routes, etc., may amount to undue prejudice.—*Consolidated F. Co. v. So. Pac. R. Co.*, 9 Inters. Com. R. 182.

The granting of a given routing to one shipper and denying it to another is in itself an unjust discrimination.—*Consolidated F. Co. v. So. Pac. R. Co.*, 9 Inters. Com. R. 182.

A carrier may not discriminate between shippers in selecting the connecting carriers and the route by which through shipments will go.—*Rea v. Mobile & O. R. Co.*, 7 Inters. Com. R. 43.

The shipper may control the route by which his freight shall go.—*Rea v. Mobile & O. R. Co.*, 7 Inters. Com. R. 43; *Pankey v. Richmond & D. R. Co.*, 3 Inters. Com. R. 33, 3 I. C. C. R. 658; *Inman v. St. L. S. W. R. Co.*, 14 Tex. Civ. App. 39, 37 S. W. 37; *San Antonio & A. P. R. Co. v. Stribling*, 14 Tex. Ct. R. 38, 89 S. W. 963, modfg. s. c. 12 Tex. Ct. R. 200, 86 S. W. 374.

In forwarding goods beyond the terminus of his route, a carrier is bound to follow with fidelity the precise instructions of the consignor, deviating from such instructions at his peril.—*Hinckley v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 429.

When a carrier accepts goods to be carried with a direction on the part of the owner to carry them a certain way, or by a specified route, he is bound to obey such direction.—*Maghee v. Camden & A. R. Co.*, 45 N. Y. 514.

Where a bill of lading for goods consigned to a point beyond the terminus of the initial carriers line is silent as to the particular line

by which the goods shall be forwarded, the initial carrier has the right to select any customary or usual route which is regarded as safe and responsible.—*Snow v. Ind. B. & W. R. Co.*, 109 Ind. 422, 9 N. E. 702.

Failure to deliver a shipper's goods to a connecting carrier chosen by said shipper and at a point designated by him, but carrying them to another point and delivering them to another connecting carrier, is an unjust discrimination, under the Texas statute.—*San Antonio & A. R. Co. v. Stribling*, 14 Tex. Ct. R. 38, 89 S. W. 963, modfg. s. c. 12 Tex. Ct. R. 200, 86 S. W. 374.

[22] Embargo.

Embargo against freight originating on particular connecting lines,— see post, § 35, note [7].

Power of Commission as to embargo,— see post, § 49, note [15].

An embargo against complainant's shipments of hay and straw to a particular station is an unlawful discrimination, even though the carrier claimed to seek thereby the relieving of a congestion and the making possible regular service to smaller dealers. Whatever may be said of an embargo as to one commodity only, in a time of congestion, nothing can be said for an embargo which refuses transportation facilities to some establishments while giving them to others.—*Rogers v. Phila. & R. R. Co.*, 12 Inters. Com. R. 352.

It is proper to give embargo notices to connecting lines to avoid further congestion of freight in junction freight yards.—*Daish v. Cleveland, A. & C. R. Co.*, 9 Inters. Com. R. 513.

Where an embargo has been proclaimed as to certain classes of freight, it must be strictly maintained and enforced, to avoid discrimination.—*Daish v. Cleveland, A. & C. R. Co.*, 9 Inters. Com. R. 513.

The anthracite coal strike caused an unprecedented use of defendant's lines for carrying bituminous coal east for industrial and domestic purposes.—*Held*, that the defendants probably had the right to give such freight a preference over hay, even issuing an embargo against articles like hay, and it was not improper that live stock, perishable freights, and material or supplies for the railroad should be exempted from any embargo imposed.—*Daish v. Cleveland, A. & C. R. Co.*, 9 Inters. Com. R. 513.

[23] Withholding through rates.

Power of carriers to establish through routes and joint rates,— see ante, § 30, note [1].

"Through routes" and "through rates" defined,— see ante, § 30, note [2].

A through rate between two points on fresh meats but not on beef cattle may be a discrimination.—*Birmingham P. Co. v. Tex. & P. R. Co.*, 12 Inters. Com. R. 33.

Refusal to make a joint rate on petroleum and its products, while making joint rates on other traffic, is not a wrongful preference or prejudice.—*Clark Co. v. L. S. & M. S. R. Co.*, 11 Inters. Com. R. 558.

Failure to publish through rates to one point on a given line, while such rates are published to other points, is undue prejudice.—*Johnson v. Ch. M. & St. P. R. Co.*, 9 Inters. Com. R. 221.

If carriers are allowed to make export rates which are very disproportionate to the corresponding domestic rates, in case of which Interst. Com. Act, § 4, is invariably observed, they should in the making of them treat all intermediate territory alike.—*Board of R. R. Comrs. v. A. T. & S. F. R. Co.*, 8 Inters. Com. R. 304.

The fact that a carrier's proportion of a through rate is its local rate for the haul over its own road or is a fixed amount, which remains the same for all points of origin or destination of traffic reached by the through line, cannot relieve it from joint responsibility as a component of the through line, if the entire rate be violative of the law.—*Board of Trade v. Ala. Mid. R. Co.*, 6 Inters. Com. 1.

It is unlawful discrimination against a locality and a commodity to withhold from its shippers through rates and through bills of lading, when such are given to other localities and commodities.—*Harwell v. Columbus & W. R. Co.*, 1 Inters. Com. R. 494, 631, 1 I. C. C. R. 236.

That a refusal to give a through rate on shipments under certain circumstances operates prejudicially to one locality and favorably to another, does not make it discriminative, for there can be no discrimination against a particular town in a regulation which is general and applies to all towns.—*Crews v. Richmond & D. R. Co.*, 1 Inters. Com. R. 490, 703, 1 I. C. C. R. 401.

[24] Carload shipments and maximum and minimum carload weights.

Power of Commission to prescribe minimum carload weights,—see post, § 49, note [14].

Reasonableness of regulation as to maximum carload weights,—see post, § 49, note [31]

Reasonableness of minimum carload weight for refrigerator cars considered.—*Consolidated Forw. Co. v. So. Pac. Co.*, 10 Inters. Com. R. 590.

The privilege of shipping small quantities of articles in the same class as a mixed carload is valuable to many shippers, but when it appears that many shippers are subjected to additional disadvantage under the operation of such a mixed carload rule, through the increase in a long standing less than carload rate, the effect of such rule is properly to be considered in passing on the reasonableness of such increased rate.—*Proctor v. C. H. & D. R. Co.*, 9 Inters. Com. R. 440.

A carrier may, in good faith and to relieve a chronic congestion, cease making carload deliveries of hay at a particular station though not ceasing carload deliveries of other commodities.—*Palmer's Board of Trade v. Pa. R. Co.*, 9 Inters. Com. R. 61.

A maximum carload weight with reasonable increase in rate on the excess loaded is not unlawful, if sufficient difference is preserved between such maximum and minimum carload weights allowed by the carrier.—*Suffern, H. & Co. v. Ind. D. & W. R. Co.*, 7 Inters. Com. R. 255.

Minimum carload weights which are less than the capacity of the cars and which vary with the size of the cars, may be, if accompanied by arbitrary penalties for excess weights, unreasonable and discriminative against shippers.—*Suffern, H. & Co. v. Ind. D. & W. R. Co.*, 7 Inters. Com. R. 255.

[25] Hauling of private or sleeping cars.

Carriers' regulations as to transportation of private cars to be published in schedules,—see ante, § 28, note [18].

When Commission will compel the hauling of sleeping cars,—see post, § 49, note [30].

A carrier may decline to haul private cars at all, or it may haul private cars of a certain class and refuse to haul private cars of a substantially different class. It cannot haul some private cars and refuse to haul others of the same kind.—*Carr v. No. Pac. R. Co.*, 9 Inters. Com. R. 1.

In determining whether it will haul private cars of a certain class, a carrier may properly take into account the effect of the practice upon the various interests and localities which it serves.—*Carr v. Pac. R. Co.*, 9 Inters. Com. R. 1.

A carrier cannot be compelled to haul sleeping cars of one private car company when it already has a sufficient supply of such cars from another company.—*Worcester Excursion Car Co. v. Pa. R. Co.*, 1 Inters. Com. R. 811, 2 Inters. Com. R. 12, 792, 3 I. C. C. R. 577.

A railroad corporation is under no legal obligation to haul the cars of a sleeping car company, and may dictate the terms upon which it will render such service.—*Denver & R. G. Co. v. Whan*, 39 Colo. 230, 89 Pac. 39.

[26] Transportation, handling and delivery of live-stock.

Delivery on sidetracks generally,—see post, note [28].

Transportation of live stock as interstate commerce,—see ante, § 25, notes [2], [9].

Duty of carrier to furnish facilities for loading and unloading of live stock,—see ante, § 26, note [18].

A carrier is under no obligation to furnish facilities for delivering and receiving stock at every point where stock yards may be established in a

city, but need only furnish such facilities as are reasonably sufficient for the business of that city. Where, by reason of the discontinuing the facilities to one stock yard the owner is obliged to receive stock through another stock yard and pay charges in addition to the usual transportation charges, the railroad will be required to give such owner facilities.—*Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. R. (U. S.) 461.

It is the duty of a carrier of live stock to provide reasonable facilities for the unloading and care of such stock; and where it has done so, either by building stock yards of its own or by contract with a stock yards company, its refusal to deliver stock to other stock yards in the same city is not an unlawful discrimination, under Interst. Com. Act, § 3.—*Central Stock Yards Co. v. L. & N. R. Co.*, 118 Fed. 113, 63 L. R. A. 213; affd. 192 U. S. 568, 24 Sup. Ct. R. (U. S.) 339.

A railroad, which is by law compelled to extend switch connections to all shippers, cannot discriminate against a shipper by refusing to deliver live stock at such switches while it delivers such freight at other points.—*Interstate Stock Yards Co. v. Indianapolis U. R. Co.*, 99 Fed. 472.

Under a statute requiring a railroad to give switch connections to all shippers, the railroad is not justified in refusing to deliver or receive live stock at the stock yards of a shipper by reason of the federal statute relative to the care of live stock in transit.—*Interstate Stock Yards Co. v. Indianapolis U. R. Co.*, 99 Fed. 472.

Where a shipper makes switch connections with the consent of the railroad, the owner may lawfully insist that the carrier shall there receive and deliver all such freight as it customarily carries, if the switch connections are convenient and suitable for the delivery and receipt of such freight.—*Interstate Stock Yards Co. v. Indianapolis U. R. Co.*, 99 Fed. 472.

The Atchison, T. & S. F. R. Co., at its Chicago depot, had no facilities for the loading and unloading of cattle, but it maintained a track connecting with the tracks of the Union Stock Yards & Transit Co., and it was customary to deliver cattle consigned to Chicago at the said stock yards. The railroad published and charged, in addition to its regular Chicago rate, a terminal charge on shipments delivered at the Union Stock Yards. The complainant, who had for many years engaged in buying, selling and shipping live stock at the Union Stock Yards, insisted that inasmuch as the railroad provided no facilities for the unloading and handling of cattle at its depot, the delivery station at the stock yards must be deemed the railroad's Chicago station, and that goods consigned to Chicago must be delivered there without the additional charge.—*Held*, that this contention was untenable.—*Walker v. Keenan*, 73 Fed. 755, revg. s. c. 64 Fed. 992; distinguishing

Covington Stock Yards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. R. (U. S.) 461.

Use of a particular live stock car and extra charge for transportation in other cars, is not an unjust discrimination.—*U. S. v. D. L. & W. R. Co.*, 40 Fed. 101.

A railroad company cannot bind itself to deliver to a particular stock yard all live stock coming over its lines at a certain point.—*McCoy v. Cincinnati, I. St. L. & C. R. Co.*, 13 Fed. 3.

Railroads may not discriminate between stock yards along its line which have the facilities for receiving and forwarding stock.—*Coe v. L. & N. R. Co.*, 3 Fed. 775.

A railroad may maintain its live stock depot at a particular point although it neither builds nor repairs nor insures the stock pens into which the cattle are unloaded, nor hires or controls the men who do the unloading. Whether the Union Stock Yards at Chicago were in railroad phraseology or in legal definition the depot of the railroad is immaterial; they were and still are in fact the point to which this stock is transported and unloaded under the shippers' contracts with the railroad, and cannot be conducted so as to bring about unreasonable or discriminative charges.—*Cattle Raisers' Assn. v. C. B. & Q. R. Co.*, 11 Inters. Com. R. 277.

That a carrier collects a terminal charge on live stock at one market city and does not at another competing market, is not, *per se*, an undue preference.—*Cattle Raisers' Assn. v. Fort Worth & D. C. R. Co.*, 7 Inters. Com. R. 513.

[27] Accommodations furnished to negroes.

Whether statutes requiring equal or separate accommodations for white persons and negroes is a regulation of interstate commerce,—see ante, § 25, note [15].

Equality of accommodation does not mean identity of accommodation, but that all paying the same price shall have substantially the same comforts and privileges, though in different cars.—*Murphy v. Western & A. R. Co.*, 23 Fed. 637; *Logwood v. Memphis & C. R. Co.*, 23 Fed. 318.

A railroad must furnish for colored passengers accommodations precisely equal to those afforded for white passengers holding similar tickets. Beyond this, it has the right to make reasonable regulations for the transporting of passengers. Whether they may classify passengers according to sex or color is expressly left undecided.—*Gray v. Cincinnati So. R. Co.*, 11 Fed. 683.

A carrier cannot discriminate against colored persons in the quality of accommodations afforded them.—*Heard v. Ga. R. Co.*, 2 Inters. Com. R. 392, 508, 3 I. C. C. R. 111.

Separate cars for colored people must be as good in comfort, etc., as those furnished white passengers for the same rate.—*Heard v. Ga. R. Co.*, 2 Inters. Com. R. 392, 508. 3 I. C. C. R. 111.

Assigning colored persons separate cars on equal terms does not constitute undue prejudice or unjust preference.—*Heard v. Ga. R. Co.*, 1 Inters. Com. R. 314, 493, 719, 1 I. C. C. R. 428; *Council v. Western & A. R. Co.*, 1 Inters. Com. R. 292, 355, 638, 1 I. C. C. R. 339.

A colored person sold a first class ticket must be furnished first class accommodations.—*Heard v. Ga. R. Co.*, 1 Inters. Com. R. 314, 493, 719, 1 I. C. C. R. 428; *Council v. Western & A. R. Co.*, 1 Inters. Com. R. 292, 355, 638, 1 I. C. C. R. 339.

A railroad cannot exclude a colored woman from a ladies' car simply on account of her color.—*Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185.

[28] Switch connections and delivery on sidetracks.

Delivery at stock yards,—see ante, note [26].

Duty of carrier to furnish switch connections,—see ante, § 27, note [1].

Denial of switch connections as undue prejudice,—see ante, § 27, note [7].

General duty to receive or deliver freight on switches,—see ante, § 27, note [13].

Reasonableness of switching charges,—see ante, § 27, note [14].

Discrimination in length of time allowed for unloading cars,—see post, § 27, note [28].

That the hazard connected with the operation of defendant's road will be increased by giving complainant sidetrack connections similar to those granted other shippers, does not excuse undue prejudice against complainant.—*Red Rock F. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 438.

That the expense to the defendant in connection with the transportation of complainant's coal will be greater than the expense connected with the carriage of coal from the mines of those now enjoying side track connections, does not excuse withholding such facilities from complainant, but is a matter to be considered by defendant in establishing the rates for transportation.—*Red Rock F. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 438.

That a railroad has not sufficient equipment to supply the requirements of all its patrons, does not excuse an otherwise unlawful discrimination as to switch connections.—*Red Rock F. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 438.

Because a carrier permits consignees of fresh meat at a certain point to unload directly from its yards to their warehouses, does not require

the concession of similar privileges to consignees of fresh fruit.—*Miner v. N. Y. N. H. & H. R. Co.*, 11 Inters. Com. R. 422.

Complainant's competitors were so situated that they could unload their meat directly from the yards into their storehouses. Complainant's place of business was across a canal and three hundred feet away, but it formerly had enjoyed similar unloading privileges. In good faith, the carrier concluded that the congestion forbade it from continuing the privilege, so far as complainant was concerned, but upon investigation, this did not seem to be the case.—*Held*, it was undue prejudice to withhold the unloading privileges.—*Miner v. N. Y., N. H. & H. R. Co.*, 11 Inters. Com. R. 422.

The refusal of a carrier to switch cars of coal to plaintiff's side track without advance payment of demurrage charges, and the retention of the coal to enforce prepayment as a condition precedent, subjects the plaintiff to an unlawful prejudice and disadvantage.—*Macloon v. Ch. & N. W. R. Co.*, 3 Inters. Com. R. 452, 711, 5 I. C. C. R. 84.

Railroads must indiscriminately deliver grain to all elevators in the same locality, situated along its lines.—*Chicago & N. W. R. R. v. People*, 56 Ill. 365.

It is not discrimination for carrier to refuse to accept grain for delivery at a warehouse on a private side track near but beyond such carrier's terminus.—*People v. Ch. & A. R. Co.*, 55 Ill. 95.

A railroad is bound to receive freight from a shipper according to its custom and usage; and if the usage has been to run the cars upon a side track to private warehouses, and there receive the freight in the cars, a tender accordingly, or a notice and readiness so to deliver, would impose an obligation on the company to take and carry the freight.—*Galena & C. U. R. Co. v. Rae*, 18 Ill. 488.

[29] Violations of long and short haul rule as discrimination.

See also, ante, § 31, note [63], post, § 36, note [29].

The same evidence which justifies the Interstate Commerce Commission in finding that a railroad can lawfully charge more for a short haul to one point than for a long haul to another point over the same line, will sufficiently answer a charge of discrimination between the two localities in violation of Interst. Com. Act. § 3.—*Interst. Com. Commission v. Nashville, C. & St. L. R. Co.*, 120 Fed. 934.

A departure from the long and short haul rule also constitutes a prejudice to the intermediate locality and shippers and traffic therefrom, which, if found to be without sufficient excuse, is unreasonable and in violation of Interst. Com. Act, § 3,—*Violations of Act to Reg. Commerce by St. L. & S. F. R. Co.*, 8 Inters. Com. R. 290.

[30] What facts show unjust discrimination or preference.

Facts showing discrimination in rates,—see also, ante, § 30, note [66].

Issuance of party-rate tickets not unjust discrimination,—see post, § 33, note [20].

Underbilling as form of unjust discrimination,—see post, § 34, note [2].

Facts showing unjust discrimination between connecting carriers,—see post, § 35, note [16].

Facts showing unjust discrimination in furnishing cars,—see post, § 37, note [13].

The court will not compel stoppage of a through train from New York to St. Louis at a small Illinois county seat, whose local and through traffic is already adequately looked after. A statute requiring such stoppage is unconstitutional. After meeting local conditions, a railroad has the right to adopt special provisions for through traffic.—*Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. R. (U. S.) 722.

A railroad company which is accustomed to receive coal at its wharf, the coal being there transferred from barges to its cars, is not justified in making a rule compelling the shippers to employ in this transfer, only shovellers furnished by the railroad.—*318½ Tons of Coal*, 14 Blatchf. (U. S.) 453.

A contract by a railroad company with a person to develop the milk traffic along its lines, giving such person an exclusive privilege "as far as it was permitted to do so by law" was not under the circumstances, an "undue preference or advantage."—*D. L. & W. R. Co. v. Kutter*, 147 Fed. 51; certiorari denied, 203 U. S. 588, 27 Sup. Ct. R. (U. S.) 776,

A common carrier may refuse to transport a circus train, loaded with wild animals.—*Wilson v. Atlantic C. L. R. Co.*, 129 Fed. 774; *affd.* 133 Fed. 1022.

A carrier bought coal and sold it under contract to deliver, at a price 23 cents per ton less than the cost of the coal, and the carrier's published freight rates for the transportation of such coal to the point of delivery.—*Held*, that this gave the favored purchaser an undue advantage or preference.—*Interst. Com. Commission v. Chesapeake & O. R. Co.*, 128 Fed. 59; *affd.* as to result, 200 U. S. 361, 26 Sup. Ct. R. (U. S.) 272.

Where a steamboat line and a railroad are operated as a continuous line, the refusal of such carrier to allow a rival steamboat company to land at its dock is not an unjust discrimination within the meaning of Interst. Com. Act, § 3, providing for the giving of equal facilities by carriers.—*Ilwaco R. & N. Co. v. Oregon R. Co.*, 57 Fed. 673, *revg. s. c.* 51 Fed. 611.

A guaranty by an agent of a railroad that a theatrical company, travelling on a party rate ticket, would arrive at its destination within a

certain time is not "giving an unreasonable preference or advantage" to a particular person or party within the meaning of the Interstate Commerce Act.—*Foster v. C. C. C. & St. L. R. Co.*, 56 Fed. 434.

To render a discrimination unlawful, the preference given to one over another must be contemporaneous, and under substantially similar conditions. Stopping to compress cotton at Vicksburg, as a sort of pious fraud on eastern purchasers, is not such a discrimination.—*Cowan v. Bond*, 39 Fed. 54.

Where a company which operates a steamship line employs the trucks owned by one firm to bring in to its pier in New York City its through traffic originating in more distant New York Harbor points, the fact that it gives preference to such trucks in admitting trucks to its pier does not show undue preference where it appears that the inadequate pier facilities are soon to be enlarged and that no one is excluded from the pier, shipments being often received late in the evening, the pier remaining open until all waiting trucks have an opportunity to unload.—*New York Team Owners' Assn. v. So. Pac. Co.* 12 Inters. Com. R. 235.

Defendant's discontinuance of delivery of oil in tank cars at its Brooklyn terminal made it practically impossible for the complainants to continue to compete with the Standard Oil Company. The discontinuance was due to fear of fire, etc., from such oil.—*Held*, that the delivery should be resumed. The prosperous business of complainants ought not to be destroyed or made subservient to a monopoly unless its continuance involves the defendant in a disproportionate risk, which is practically unavoidable. The delivery should be resumed, subject to such regulations as protect defendants from danger of fire, etc., as far as possible.—*Preston v. D. L. & W. R. Co.*, 12 Inters. Com. R. 131.

A railroad cannot arbitrarily determine that a particular mill shall compete in a certain market with other localities, and that other mills upon its lines shall not so compete, unless, at least, it can justify that discrimination by some operating condition, which shows that it is for its advantage to transport from the one point and not from the other.—*Texas C. P. Co. v. St. L. & S. F. R. Co.*, 12 Inters. Com. R. 78.

The refusal of a carrier to do what it reasonably and conveniently can to put a particular shipper on equal terms with his competitors in the matter of traffic facilities, may constitute an undue prejudice.—*Miner v. N. Y. N. H. & H. R. Co.*, 11 Inters. Com. R. 422.

The defendant railway should so conduct all its operations relating to the transportation of passengers to Yellowstone Park as to afford to such passengers full and equal opportunity, whether at the terminus of its branch line or elsewhere, to select the stage line or other agency which they may desire to use for touring the park, as well as the places of their entertainment therein.—*Wylie v. No. Pac. R. Co.* 11 Inters. Com. R. 145.

A shipper of railroad ties complained that the defendant railroad placed restrictions on the shipment of ties, alleging a shortage of cars, but transported other materials and ties for its own use, seeking to confine the complainant's market in ties to its own line, thus enabling itself to obtain ties at a lower price.—*Held*, that this was a violation of Interst. Com. Act, § 3, forbidding unjust discrimination.—*Paxton Tie Co. v. Detroit S. R. Co.*, 10 Inters. Com. R. 422.

Because carriers have contracted with certain shippers for the leasing of special cars to the carriers, the latter are not bound to contract similarly with all or other shippers.—*Consolidated F. Co. v. So. Pac. R. Co.*, 9 Inters. Com. R. 182.

While carriers ordinarily must not create or give artificial advantages to one community as compared with others similarly situated, it may be justifiable to give a seaport rate to one town 20 miles from the ocean, and not to another, where such an arrangement benefits a whole section by making a low-priced distributing center.—*Holdzkom v. Mich. Cent. R. Co.*, 9 Inters. Com. R. 42.

If demurrage charges, when added to transportation rates, result in greater aggregate charges in certain cases than in other cases involving longer hauls, this may constitute an undue preference as between localities.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

A carrier cannot lawfully establish and maintain an adjustment of rates which in practice prevents shippers on its line from availing themselves of a principal market which they have long been using, and confers a substantial monopoly upon a new market in which, for reasons of its own, it has greater interest.—*Savannah Bureau v. L. & N. R. Co.*, 8 Inters. Com. R. 377.

While in mere amount rates made by combining local rates may be entirely reasonable, they may nevertheless operate to unduly oppress the more distant locality.—*Gustin v. A. T. & S. F. R. Co.*, 8 Inters. Com. R. 277.

A carrier may make a low rate to create traffic.—*Grain Shippers' Assn. v. Ill. Cent. R. Co.*, 8 Inters. Com. R. 158.

The location of Cincinnati on the north bank of the Ohio river, whose bridges charge high tolls, and the greater distance, justify higher rates from that city than from Louisville, to the common market in the South.—*Freight Bureau v. C. N. O. & T. P. R. Co.*, 7 Inters. Com. R. 180.

A party to an interstate shipment cannot be excluded by the carriers from privileges afforded other patrons in the same locality, because of his refusal to pay excessive freight charges, even though an agreement to subsequently refund the excess should accompany the demand.—*Phelps v. Tex. & P. R. Co.*, 6 Inters. Com. R. 36.

Carriers should not undertake to deprive a shipper of the legitimate advantages which his enterprise, investment and utilization of just rates, have secured for him.—*Potter Mfg. Co. v. Ch. & G. T. R. Co.*, 4 Inters. Com. R. 223, 5 I. C. C. R. 514.

Use of hypothetical weights, out of proportion to the actual weights, will not be permitted, as a means whereby tank shippers get more oil carried for the same money than barrel shippers.—*Rice v. Cincinnati, W. & B. R. Co.*, 3 Inters. Com. R. 841, 5 I. C. C. R. 193.

A railroad is not obliged to continue the rates it had in force when it sold complainant the land on which he built up his business in reliance upon those rates.—*Buchanan v. No. Pac. R. Co.*, 3 Inters. Com. R. 655, 5 I. C. C. R. 7.

Municipal subscriptions or other forms of gratuities to a carrier do not authorize preferences.—*Lincoln Board of Trade v. Burl. & Mo. R. Co.*, 2 Inters. Com. R. 95, 2 I. C. C. R. 147.

A carrier does not discriminate unjustly against or for any locality, in refusing to send its cars to points off its own line when the business on such line keeps them in use.—*Riddle Co. v. B. & O. R. Co.*, 1 Inters. Com. R. 701, 778, 1 I. C. C. R. 372.

A carrier may not adjust rates so as to prevent shippers of railroad material from selling it in the best available market.—*Reynolds v. W. N. Y. & P. R. Co.*, 1 Inters. Com. R. 600, 685, 1 I. C. C. R. 393.

Where a railroad has for some years served persons having places of business along a certain track, delivering cars of freight and cars to be loaded and shipped, it is a common carrier with respect to the use it made of said track, and cannot discontinue service to one shipper while continuing to serve the others.—*Agee v. L. & N. R. Co.*, 142 Ala. 344, 37 So. 680.

If, by reason of an unusual quantity of grain on the line for shipment, a want of means in the country of storing it, or other pressing cause, a railroad takes grain from wagons or from boats while grain remained in private warehouses for shipment, and in so doing, acted in good faith, intending to afford the largest public accommodation, and not from motives of partiality or oppression, it has not thereby incurred legal liability.—*Galena & C. U. R. Co. v. Rae*, 18 Ill. 488.

A carrier may not contract with one telegraph company not to transport the laborers or materials of another company at a special rate.—*Cumberland T. & T. Co. v. Morgan's L. & T. R. Co.*, 51 La. Ann. 29, 24 So. 803.

A contract between a carrier and a shipper, that the former will maintain rates from the latter's factory not exceeding the rates from two other places where mills are located which compete with such shipper, is not, on its face, void, under a statute prohibiting unjust

discrimination.—*Laurel Cotton Mills v. Gulf & S. I. R. Co.*, 84 Miss. 339, 37 S. 134, 66 L. R. A. 453.

A violation of rules warranting ejection from a train does not warrant the carrier in refusing to sell the offender tickets thereafter.—*State ex rel. Atwater v. D. L. & W. R. Co.*, 48 N. J. L. 55, 2 Atl. 803.

An agreement between a canal company and a coal company, providing that the coal company may ship coal by way of the canal, using not to exceed one-half the capacity of the canal, and fixing the tolls with reference to the market price of the coal, is not invalid.—*Commonwealth v. D. & H. Canal Co.*, 43 Pa. 295.

The English Canal and Traffic Act of 1854 (17 and 18 Vict. ch. 31), provided "that every railway company * * * shall afford all reasonable facilities for the receiving and forwarding and delivering of traffic * * *; and no such company shall give any undue or unreasonable preference or advantage to * * * any particular person or company * * *; nor shall any such company subject any particular person or company or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." A railway company made a practice of carrying coal in very large quantities, but for convenience in handling the large amount of traffic over its road it made a practice of carrying coal for colliery owners only, from the pit's mouth to stations where such colliery owners had cells appropriated to their use for the reception and sale of their coal. The complainant was a coal merchant, and on a certain day he tendered 16 cars or trucks loaded with coal to the railway company at one of its stations, to be forwarded to three other stations on its road where the complainant had no cell or siding appropriated to his special use for the reception of his coal trucks and the sale of coal. The railway company declined to receive and haul his trucks, although they were in a fit and proper condition to pass over its road, whereupon he sought to compel the company to do so.—*Held*, that owing to the large amount of traffic in coal over the company's road it had an undoubted right to say that it would haul coal for colliery owners only who had acquired the requisite facilities for the receiving and disposing of coal promptly on arrival at its destination, as otherwise the carrier would not have the requisite control over its road. If the privilege demanded by complainant were accorded him, it would have to be accorded to all other persons, and the carrier would be deprived of the benefit of an arrangement which it had devised to ensure the safe and convenient operation of its road. Accordingly, notwithstanding the broad inhibition in the Traffic Act above quoted, a carrier handling coal in very large quantities is entitled to make regulations with respect to the manner of receiving and transporting it so that it may be handled expeditiously, economically, safely, with-

out any unnecessary interference with the carrier's other business. It follows, of course, that regulations made by a carrier with these objects in view and really designed to promote them, cannot be complained of on the ground that they operate as a preference in favor of those who comply with them or as a discrimination against those who do not.—*Oxlade v. N. E. R. Co.*, 15 C. B. (N. S.) (Eng.) 680.

[31] Actions by shipper — Right of action.

Recovery of overcharge,—see ante, § 26, notes [52], [57].

Actions arising from discriminations in rates,—see ante, § 31, notes [81]–[88].

Right of action by connecting carrier to recover for unjust discrimination,—see post, § 35, note [29].

Enjoining discriminations between connecting carriers,—see post, § 35, note [30].

Actions to recover for violations of long and short haul rule,—see post, § 36, notes [37]–[41].

Actions for failure to furnish or for discrimination in furnishing cars,—see also post, § 37, notes [17]–[23].

Whether statutory remedies supplant existing rights of action,—see post, § 40, note [2].

Mandamus to compel rendering of services without discrimination,—see post, § 57, note [13].

Under a statute prescribing penalties for “extortion or unjust discriminations,” recovery cannot be had for failure to furnish cars or transportation, as required by that Act.—*Bond v. Wabash, St. L. & P. R. Co.*, 67 Iowa, 712, 25 N. W. 892.

Where the acts of discrimination are of daily recurrence, the party aggrieved is entitled to an injunction to restrain the continuance of the wrongs complained of, the remedy at law being inadequate.—*Louisville & N. R. Co. v. Central Stock Yards Co.*, 30 Ky. L. R. 18, 97 S. W. 778.

Mandamus will lie, at the instance of a complainant, to force a carrier to give facilities equal to those given a favored rival.—*State v. Tex. & P. R. Co.*, 52 La. Ann. 1850, 28 So. 284.

Where the shipper requested the initial carrier to route his goods by a shorter route, which was wrongfully denied, he can recover damages.—*Houston & T. C. R. Co. v. Buchanan*, 15 Tex. Ct. R. 521, 94 S. W. 199.

Where the carrier has rendered special gratuitous service for one shipper and not for another, the latter may recover the cost of rendering the same service for his goods.—*Evershed v. London & N. W. R. Co.*, L. R. 2 Q. B. D. (Eng.) 254.

[32] — Complaint.

A complaint alleging a conspiracy between railroad companies and an association of elevator owners whereby the latter deny equal advantages to the grain of a particular elevator states a good cause of action.—*Kellogg v. Lehigh V. R. Co.*, 61 App. Div. (N. Y.) 35, 70 N. Y. Supp. 237.

A complaint for discrimination in facilities held not to state a cause of action.—*Meyers v. Ch. M. & St. P. R. Co.*, 50 Minn. 371, 52 N. W. 962.

[33] — Adequacy of remedy at law.

There is no adequate remedy at law where a railroad discriminates against a shipper by refusing to deliver or receive freight at his switches.—*Interstate Stockyards Co. v. Indianapolis U. R. Co.*, 99 Fed. 472.

[34] — Evidence.

In an action by a shipper against a carrier under a statute forbidding unjust discrimination between localities, it is not necessary for him to prove a personal discrimination and personal injury thereby.—*Illinois Cent. R. Co. v. People*, 121 Ill. 304, 12 N. E. 670.

In an action against a carrier for discriminations between localities under a state statute, it is not necessary to show that the rates charged were higher than those fixed or approved by the state commission.—*Cohn v. St. Louis, I. M. & S. R. Co.*, 181 Mo. 30, 79 S. W. 961.

[35] Criminal liability.

Criminal liability for discriminations in rates,—see ante, § 31, notes [89]–[94].

Indictment for discrimination by failure to furnish cars,—see post, § 37, note [24].

An indictment charging a violation of Interst. Com. Act, § 3, relating to the giving of undue preferences to persons or localities, is sufficient if it shows with requisite certainty, by any apt language, that the accused has committed any act which gives one shipper or class of shippers an advantage, or subjects others to a disadvantage, and it is unnecessary to allege that the services were rendered “under substantially similar circumstances and conditions.”—*U. S. v. Tozer*, 37 Fed. 635, 2 L. R. A. 444n.

§ 33. Transportation prohibited until publication of schedules; rates as fixed to be charged; passes prohibited;* [issuance of mileage, excursion and commutation tickets].—No common carrier subject to the provisions of this act shall after the first day of November, nineteen hundred and seven, engage or participate in the transportation of passengers, freight or property, between points within the state, until its schedules of rates, fares and charges shall have been filed and published in accordance with the provisions of this act. No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of passengers, freight or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances. No common carrier subject to the provisions of this act shall, directly or indirectly, issue or give any free ticket, free pass or free transportation for passengers or property between points within this state, except to its officers, employees, agents, pensioners, surgeons, physicians, attorneys-at-law, and their families; to ministers of religion, officers and employees of railroad young men's Christian associations, inmates of hospitals, charitable and eleemosynary institutions and persons exclusively engaged in charitable and eleemosynary work; and to indigent, destitute and homeless persons and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the national homes or state homes for disabled volunteer soldiers and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge, and boards of managers of such homes; to necessary caretakers of property in transit; to employees of sleeping-car companies, express companies, telegraph and telephone companies doing business along the line of the issuing carrier; to railway mail service employees, post-office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation or proceed-

* Words in brackets are not a part of section heading as enacted.—ED.

ing in which the common carrier is interested, persons injured in accidents or wrecks and physicians and nurses attending such persons; to the carriage free or at reduced rates of persons or property for the United States, state or municipal governments, or of property to or from fairs and expositions for exhibit thereat. Nothing in this act shall be construed to prohibit the interchange of free or reduced transportation between common carriers of or for their officers, agents, employees, attorneys and surgeons and their families, nor to prohibit any common carrier from carrying passengers or property free, with the object of providing relief in cases of general epidemic, pestilence or other calamitous visitation; nor to prohibit any common carrier from transporting persons or property as incident to or connected with contracts for construction, operation or maintenance, and to the extent only that such free transportation is provided for in the contract for such work.

Provided further, that nothing in this act shall prevent the issuance of mileage, excursion, or commutation passenger tickets, or joint interchangeable mileage tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand miles or more. But before any common carrier, subject to the provision of this act, shall issue any such mileage, excursion, commutation passenger ticket or joint interchangeable mileage ticket, with special privileges as aforesaid, it shall file with the commission copies of the tariffs of rates, fares or charges on which such tickets are to be based, together with the specifications of the amount of free baggage permitted to be carried under such joint interchangeable mileage ticket, in the same manner as common carriers are required to do with regard to other rates by this act. Nor shall anything in this act prevent the issuance of passenger transportation in exchange for advertising space in newspapers at full rates.

Provisions of the Interstate Commerce Act relative to the giving of passes,—see Interst. Com. Act, § 1, post, Appendix B.

Copies of tariff schedules filed with the Interstate Commerce Commission are prima facie evidence on investigations before the Commission and in judicial proceedings,—see Interst. Com. Act, § 16, post, Appendix B.

Commissioners and employees of Commissions shall not accept free transportation,—see ante, § 15.

- Transportation shall not be permitted at less than the scheduled rates, by means of false billing, false classification, false weight, or any other device or means,—see post, § 34.*
- Liability of carrier for loss of passengers' baggage,—see post § 38.*
- Actions by aggrieved persons for loss or damage caused by charging other than the published rates,—see post, § 40.*
- Penalties and forfeitures for charging other than published rates,—see post, § 56.*
- General power of the state to regulate property devoted to public use, see ante, § 1, notes [1]–[22].*
- General power of the state to regulate rates and charges,—see ante, § 1, note [2].*
- Exemption from public control,—see ante, § 1, notes [16]–[21].*
- General rules of statutory construction,—see ante, § 1, notes [23]–[40].*
- Purpose of acts regulating railroads,—see ante, § 1, note [32].*
- Who are common carriers,—see ante, § 2, notes [2]–[7].*
- What constitutes a railroad or street railroad,—see ante, § 2, note [8].*
- Effect of receivership on power to regulate,—see ante, § 2, note [15].*
- Scope of state and federal power as to rates and charges,—see ante, § 25, note [10].*
- What statutes regulating rates amount to a regulation of interstate commerce,—see ante, § 25, note [14].*
- Posted schedules fix rates of shipment in absence of contract,—see ante, § 26, note [37].*
- Restraining excessive rates,—see ante, § 26, note [48].*
- Power of state to require posting of tariff schedules,—see ante, § 28, note [1].*
- Competition created by departures from published schedules not a justification of disparities in rates,—see ante, § 31, note [39].*
- That charges complained of were duly filed and posted a defense in action for unjust discrimination,—see ante, § 31, note [87].*

[1] Duty to charge published rate.

An initial carrier, when it has once established a joint traffic compact to transport property over a certain route between points in different states and has published the rates for such transportation, cannot transport over any connecting route pursuant to traffic arrangement at a less rate than that filed.—*U. S. v. Pa. R. Co.*, 153 Fed. 625; *U. S. v. Vacuum Oil Co.*, 153 Fed. 598.

All goods offered for shipment at a certain point must be carried at the declared rate for such goods from such point, regardless of the place where the shipment originated.—*Bigbee & W. R. P. Co. v. Mobile & O. R. Co.*, 60 Fed. 545.

No railroad may lawfully stipulate or contract with a telegraph company for the carriage of the latter's officials, employees or property at other than the published rates, except in connection with the construction, operation and maintenance of a telegraph service on its own lines or system.—*Matter of Railroad Telegraph Companies*, 12 Inters. Com. R. 10.

It is manifestly contrary to law and leads to confusion for one line of rates to be retained in published tariffs while others are in fact used on actual shipments.—*Cannon v. Mobile & O. R. Co.*, 11 Inters. Com. R. 537.

Where joint routes and rates have been established, they must be kept open to public use until formally changed or abrogated.—*Consolidated F. Co. v. So. Pac. R. Co.*, 9 Inters. Com. R. 182.

Instructions by a carrier to its agents to disregard the regular published tariff rates to certain points and to use combination rates, whenever the latter are lower, are unlawful, if such rule and practice have not been duly announced on the tariff schedules.—*Spillers v. L. & N. R. Co.*, 8 Inters. Com. R. 364.

A carrier may not directly or indirectly make any charge for any special service not specified in the published schedules.—*American Warehousemen's Assn. v. Ill. Cent. R. Co.*, 7 Inters. Com. R. 556.

A carrier may not charge more nor less than the rate set forth in the schedules.—*Suffern, H. & Co. v. Ind. D. & W. R. Co.*, 7 Inters. Com. R. 255.

Where no special contract is made as to the rates for a shipment, the posted schedules govern.—*Kellerman v. K. C. St. J. & C. B. R. Co.*, 136 Mo. 177, 34 S. W. 41.

[2] Effect of special rules and regulations.

Separate issuance in circulars of rules and regulations affecting the aggregate rate does not authorize any charge in addition or excess of that contained in the carrier's rate sheets.—*Suffern, H. & Co. v. Ind. D. & W. R. Co.*, 7 Inters. Com. R. 255.

[3] Transportation for governmental departments.

Transportation of fish or fish eggs for the United States Commission of Fisheries may be done at less than the published rates.—*In re U. S. Commission of Fisheries*, 1 Inters. Com. R. 606, 1 I. C. C. R. 21.

[4] Publication of rates condition precedent to right to charge.

Publication of rates and charges condition precedent to engaging in interstate transportation,—see Interst. Com. Act, § 6, post, Appendix B.

The Interstate Commerce Act is not self-executing as to the public, and shippers are not affected by rates fixed under it until the required

publication of rates has been made. The burden is on the carriers to show compliance with this condition precedent.—*Atlanta, K. & N. R. Co. v. Horne*, 106 Tenn. 72, 59 S. W. 134.

[5] When published rate must be tendered.

One who has obtained interstate transportation at a rate specified in the bill of lading, less than the published rates filed with and approved by the Interstate Commerce Commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges; in other words, whatever may be the rate agreed upon, the carrier's lien on the goods, is, by force of the Act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods, only by the payment, or tender of payment, of such amount.—*Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. R. (U. S.) 628, revg. s. c. 98 Tex. 352, 83 S. W. 800; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. R. (U. S.) 802; *Southern R. Co. v. Harrison*, 119 Ala. 539, 24 So. 552.

On tender of the rate set forth in the bill of lading, the consignee is entitled to receive his goods, even though such rate is less than that approved by the Commission, if the carrier does not prove publication of the latter rate.—*Atlanta, K. & N. R. Co. v. Horne*, 106 Tenn. 72, 59 S. W. 134.

[6] Contracts for shipment.

Reparation will not be allowed a shipper for a breach of a contract by the carrier to accord a privilege not offered to the general public in the published tariffs.—*Shiel v. Ill. Cent. R. Co.*, 12 Inters. Com. R. 242.

A contract for shipment at less than the published rate is void, and no action lies under the Interstate Commerce Act for excessive charges by reason of the violation of such contract.—*Red Cloud M. Co. v. So. Pac. R. Co.*, 9 Inters. Com. R. 216.

All contracts entered into with carriers are presumed to be governed by the classification sheet in force at the time of the shipment. Whether such classification is just or unjust, it is nevertheless binding on both the carrier and shipper so long as it remains in force, regardless of any contract for a greater or less rate.—*Smith v. Gt. Northern R. Co.*, — N. Dak. —, 107 N. W. 56.

[7] Effect of failure to properly post schedule.

The filing of a tariff of rates by the carrier with the Interstate Commerce Commission and the carrier's freight agents put the rates in force,

even though the copies have not been posted in the carrier's depots, as required by the Interstate Commerce Act.—*Texas & P. R. Co. v. Cisco Oil Mill Co.*, 204 U. S. 449, 27 Sup. Ct. R. (U. S.) 358.

The provision of the Interstate Commerce Act that rates posted shall be charged does not apply where copies of the schedules have been placed with the station agent and a notice posted that he has them and that they can be inspected on application.—*Wabash R. Co. v. Sloop*, 200 Mo. 198, 98 S. W. 607.

[8] Recovery of excess charges.

Any charges imposed on the shipper pursuant to rules and regulations not published in the carrier's rate sheets may be recovered as excess charges.—*Suffern, H. & Co. v. Ind. D. & W. R. Co.*, 7 Inters. Com. R. 255.

[9] Shipper bound to know lawful rate.

A shipper is charged with knowing the lawful rate if it has been duly published.—*U. S. v. Standard Oil Co.*, 155 Fed. 305.

Shippers and consignees cannot depend for the lawful rate or charge on what is quoted to them by the carrier's agent, but must be guided by the published rate sheets.—*Suffern, H. & Co. v. Ind. D. & W. R. Co.*, 7 Inters. Com. R. 255.

[10] Indictments for failure to exact published rate.

An indictment under the Interstate Commerce Act against a railroad for charging more than the rate published in its schedule, it appearing that after the establishment of a joint through route and the publication of schedules of rates therefor, the defendant transported goods for a shipper over a different route at a less rate, is not insufficient for failure to allege that the rate over the latter route was not published and filed.—*U. S. v. Pa. R. Co.*, 153 Fed. 625.

In an indictment under the Interstate Commerce Act against a railroad for charging a greater rate than that published in the schedule, allegations that a common arrangement existed between the defendant and connecting carriers named for a continuous forwarding of property, in interstate commerce, between certain points and that the defendant kept open for public inspection its printed tariff of rates and filed the same as required by law, together with the allegation that the shipment was accompanied by written shipping bills showing a continuous shipment between the named points, sufficiently charge *prima facie* the establishment of a joint tariff or rates for the commodities in question and it is unnecessary to specifically charge that all the connecting carriers con-

curred in such joint rate or that it was filed with the Interstate Commerce Commission by their joint action.—*U. S. v. Pa. R. Co.*, 153 Fed. 625.

Where an initial carrier establishes a joint through route between certain points and publishes a schedule of rates for such transportation, an indictment against a shipper for receiving an unjust discrimination through the sending of his goods over another route between the same points at a less rate need not allege that any shipper has been required to pay a different rate over the latter route nor that shipments were ever made over the former route at the published rate.—*U. S. v. Vacuum Oil Co.*, 153 Fed. 598.

An indictment under the Elkins Act need not allege that the published rate is a reasonable rate and need not set out in full the carrier's tariffs, but is sufficient if it avers what the published rates were and that certain property was transported at a preferential rate.—*U. S. v. Standard Oil Co.*, 148 Fed. 719.

An allegation in an indictment that full schedule rates were paid by the shipper to the carrier, and that a rebate therefrom was subsequently granted under a previously made unlawful agreement, sufficiently makes out wilful failure to observe the published tariff.—*U. S. v. N. Y. C. & H. R. R. Co.*, 146 Fed. 298.

An indictment for the violation of Interst. Com. Act, § 6, forbidding the charging of a greater or less rate than that contained in the published schedules, which avers that the railroad company is a common carrier and sets forth the schedule rates and further avers that the defendants were officers of the railroad and charged the schedule rates on shipments by a certain person during a certain period, and that said defendants paid a rebate on each car so transported, sufficiently sets forth transactions which resulted in the giving of less than the schedule rate then in force, and it is not a sufficient objection that the day or days upon which the shipments were made are not stated, nor that it is not charged that when the shipments were made it was intended to demand and receive a less rate than the schedule rate.—*U. S. v. Hanley*, 71 Fed. 672.

[11] Lawfulness of issuance of passes.

Receiving of free transportation by public officers,—see ante, § 15, note [3].

A railroad company may not lawfully exchange free transportation with an omnibus and transfer company, nor grant free transportation to the officers and employees of the same.—*Petition of Frank Parmlee Co.*, 12 Inters. Com. R. 46.

Caretakers who sort the newspapers on special trains are not entitled to free transportation as caretakers of the kinds of traffic enumerated in Interst. Com. Act, § 1.—*Transportation of Newspaper Employees*, 12 Inters. Com. R. 16.

Carriers may give free transportation only to such employees as are *bona fide* and actually such.—*Complaint of Ill. Cent. R. Co.*, 12 Inters. Com. R. 7.

A carrier may not lawfully give free transportation to land or immigration agents not its actual employees.—*Complaint of Ill. Cent. R. Co.*, 12 Inters. Com. R. 7.

Issuance of free passes to shippers on account of freight furnished is unlawful.—*Milk Prod. P. Assn. v. D. L. & W. R. Co.*, 7 Inters. Com. R. 92.

Interst. Com. Act, § 22, is exceptive in character, and permits the issuance of free transportation only to the classes of persons specified therein.—*In re Boston & M. R. Co.*, 3 Inters. Com. R. 717, 5 I. C. C. R. 69.

Giving free transportation to city aldermen, etc., because of their position, is unlawful.—*Harvey v. L. & N. R. Co.*, 2 Inters. Com. R. 662, 3 Inters. Com. R. 793, 5 I. C. C. R. 153.

An annual pass to a person not a regular employee of the issuing carrier but under an agreement to throw it what business he could, is unlawful.—*Slater v. No. Pac. R. Co.*, 2 Inters. Com. R. 32, 243, 2 I. C. C. R. 359.

The furnishing of a pass, under a contract by which the recipient becomes a railroad policeman and gets for his service an annual pass together with a fixed salary, is not the giving of a "free pass."—*Dempsey v. N. Y. C. & H. R. R. Co.*, 146 N. Y. 290, 40 N. E. 867, affg. s. c. 81 Hun (N. Y.), 156, 30 N. Y. Supp. 724.

A person appointed as railroad policeman, under N. Y. R. R. L., § 58, is a public officer within the meaning of the section of the Constitution as to free passes.—*Dempsey v. N. Y. C. & H. R. R. Co.*, 146 N. Y. 290, 40 N. E. 867, affg. s. c. 81 Hun (N. Y.), 156, 30 N. Y. Supp. 724.

[12] Who are gratuitous passengers.

The holder of a pass who has compensated the carrier therefor cannot in any sense be regarded as a gratuitous passenger.—*Smith v. N. Y. C. R. Co.*, 24 N. Y. 222.

[13] Giving of passes as an unjust discrimination.

Passes were given by a railroad to persons not belonging to any of the excepted classes mentioned in Interst. Com. Act, § 22. It has been

held that such an act constitutes an unjust discrimination.—*In re Charge to Grand Jury*, 66 Fed. 146.

[14] Construction of statutes relative to passes.

The proviso clause of Interst. Com. Act, § 1, as to the giving of free transportation, etc., should receive a narrow and strict construction.—*Petition of Frank Parmlee Co.*, 12 Inters. Com. R. 46.

The words "common carriers," in the proviso clause of Interst. Com. Act, § 1, refers only to the common carriers mentioned in the main clause, viz., those subject to the Act.—*Petition of Frank Parmlee Co.*, 12 Inters. Com. R. 46.

Where Congress has expressly enumerated special classes of persons or things which may be or must be exempted and excepted from the operations of general provisions of a law, the Interstate Commerce Commission cannot enlarge the excepted classes by mere construction and include in them persons or things not thus expressly named in the Act itself.—*Transportation of Newspaper Employees*, 12 Inters. Com. R. 16.

[15] Retroactive effect of statute.

The Act of Congress of July 29, 1906, forbidding issuance of free transportation, does not invalidate a contract previously made by the carrier, for sufficient consideration, for issuance of passes to complainants during their lives.—*Mottley v. L. & N. R. Co.*, 150 Fed. 406.

A notary public who lawfully received a pass before the N. Y. Constitution, with its prohibition of passes, went into effect, may not use it thereafter as long as he holds his public office.—*People v. Rathbone*, 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384.

[16] Decision of commission as to passes.

The Interstate Commerce Commission will not decide, upon an *ex parte* request, whether free passes may legally be given to certain classes of persons.—*In re Disabled Soldiers and Sailors*, 1 Inters. Com. R. 75, 1 I. C. C. R. 28.

[17] Prosecution for giving of free transportation.

In a prosecution of a carrier for discrimination where free transportation is alleged to have been given to one person, it is unnecessary to charge or prove that at the same time and on the same train there were other passengers paying fare.—*State v. So. R. Co.*, 125 N. C. 666, 34 S. E. 527.

[18] Powers and duties of carrier as to issuance of special tickets and mileage.

Provisions as to reduced fares, excursion tickets, mileage books, etc., in interstate transportation,—see Interst. Com. Act, § 22, post, Appendix B.

Recovery of penalties for refusal to issue mileage books,—see ante, § 26, note [68].

A railroad company has the right to sell nontransferable excursion tickets and the condition therein contained that the same shall be non-transferable and shall be forfeited if used by any person other than the purchaser, is not only binding upon the original purchasers but upon any who acquire such tickets and attempt to use them in violation of those terms.—*Bitterman v. L. & N. R. Co.*, 207 U. S. 205, 28 Sup. Ct. R. (U. S.) 91, affg. s. c. 144 Fed. 34.

The right to issue round trip excursion tickets given to carriers by the Interstate Commerce Act carries with it the duty on the part of the carriers to exercise due diligence to prevent the use of such tickets by other than the original purchasers. Otherwise the Act would give to carriers the right to disregard the prohibition against preferences which it was one of the great purposes of the Act to render efficacious.—*Bitterman v. L. & N. R. Co.*, 207 U. S. 205, 28 Sup. Ct. R. (U. S.) 91, affg. s. c. 144 Fed. 34.

Carrier may issue special tickets at reduced rates, in consideration of special conditions therein.—*Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689.

A carrier may issue mileage, excursion or commutation tickets, or discontinue the same in a reasonable discretion.—*Sprigg v. B. & O. R. Co.*, 8 Inters. Com R. 443.

A mileage book, not good for any trip which passes through another state (e. g. Pennsylvania), is good for the portion of the trip which lies wholly within this state.—*Horton v. Erie R. Co.*, 86 App. Div. (N. Y.) 379, 83 N. Y. Supp. 733, 65 App. Div. (N. Y.) 587, 72 N. Y. Supp. 1018.

A railroad company, required by law to issue mileage books, cannot impose arbitrary conditions on such issuance.—*Trolan v. N. Y. C. & H. R. Co.*, 31 App. Div. (N. Y.) 320, 52 N. Y. Supp. 257.

Under a statute requiring railroads to issue mileage books, there is no consideration for a contemporaneous agreement contained in such books that the passenger will exchange such coupons for a ticket at a station, and the refusal of a conductor to accept such a mileage book for transportation subjects the carrier to a penalty.—*Corcoran v. N. Y. C. & H. R. Co.*, 25 App. Div. (N. Y.) 479, 49 N. Y. Supp. 701; affd. 164 N. Y. 587, 58 N. E. 1086.

Under a statute requiring the issuance of mileage books by railroads, a railroad company cannot, as condition to the issuing of the book, require the purchaser to subscribe his name to a condition in such book, to the effect that if the ticket be presented by any person other than the one named in the ticket the same should be forfeited and taken up by the agent or conductor to whom it might be presented.—*Watson v. N. Y. Ont. & W. R. Co.*, 24 Misc. (N. Y.) 628, 28 N. Y. Supp. 84.

The law having made it the duty of railroad corporations to sell and accept mileage books for transportation, the issuance of such a book is not sufficient consideration to support a contract required by the company as to the manner of its use.—*Corcoran v. N. Y. C. & H. R. R. Co.*, 20 Misc. (N. Y.) 197, 45 N. Y. Supp. 861; *affd.* 25 App. Div. (N. Y.) 479, 49 N. Y. Supp. 701, 164 N. Y. 587.

[19] Compelling issue of special tickets.

Power of Commission to compel issuance of special tickets,—see post, § 49, note [16].

Mandamus to compel issuing of special ticket,—see post, § 57, note [13].

An Act of the Michigan legislature (No. 90 of 1891), requiring the sale of thousand mile tickets for passenger transportation, is unconstitutional.—*Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. R. (U. S.) 565, revg. s. c. 114 Mich. 460, 72 N. W. 328.

Interst. Com. Act, § 22, permits carriers to issue mileage, excursion, and commutation tickets, but does not confer authority to compel them to do so, ordinarily. To the extent necessary for their use, tickets of these descriptions are exempt from the general rules of the statute though the Commission may, as to them, direct compliance therewith.—*Sprigg v. B. & O. R. Co.*, 8 Inters. Com. R. 443.

[20] Party-rate tickets.

See also, ante, § 31, note [57].

The issuance of party-tickets, giving a special rate to parties of ten or more persons, is not an unjust discrimination under Interst. Com. Act, §§ 1, 2, 3, as a carrier is only bound to give the same terms to all persons alike under the same conditions and circumstances and a fact which produces an inequality of circumstances justifies an inequality of charge.—*Interst. Com. Commission v. B. & O. R. Co.*, 145 U. S. 263, 12 Sup. Ct. R. (U. S.) 844, *affg.* s. c. 43 Fed. 37.

The United States Government is not entitled to a party rate for the transportation of its soldiers.—*U. S. v. Ch. & N. W. R. Co.*, 127 Fed. 785.

Party-rate tickets cannot be limited to particular classes of persons, but must be open to the whole public alike.—*In the Matter of Party Rate Tickets*, 12 Inters. Com. R. 110.

Party-rate tickets are not commutation or excursion tickets, and may not lawfully be sold at less than the contemporaneous rates for single passengers.—*Pittsburg, C. & St. L. R. Co. v. B. & O. R. Co.*, 2 Inters. Com. R. 572, 729, 3 I. C. C. R. 465.

[21] Filing and publication of excursion rates.

Passenger excursion rates must be filed and published under Interst. Com. Act, § 6.—*Pittsburg, C. & St. L. R. Co. v. B. & O. R. Co.*, 2 Inters. Com. R. 572, 729, 3 I. C. C. R. 465.

[22] Suits as to tickets.

Where a railroad is about to issue nontransferable reduced rate round trip tickets and it appears that certain persons have in the past bought and sold the return coupons of similar tickets and intend to buy and sell the return coupons of the tickets about to be issued, an injunction will lie to prevent such traffic in any tickets which may in the future be issued.—*Bitterman v. L. & N. R. Co.*, 207 U. S. 205, 28 Sup. Ct. R. (U. S.) 91, affg. s. c. 144 Fed. 34.

If one maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer.—*Angle v. Ch. St. P. M. & D. R. Co.*, 151 U. S. 1, 14 Sup. Ct. R. (U. S.) 240.

When railroads issue nontransferable round trip tickets at reduced rates, it is proper to issue an injunction to restrain persons who have in the past and intend in the future to buy and sell the unused return coupons of these tickets from engaging in such traffic.—*Illinois Cent. R. Co. v. Caffrey*, 128 Fed. 770.

A carrier who comes into court asking equity to enforce its rights under special contract tickets must come with clean hands, not as a member of an unlawful pool.—*Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689.

On account of a centennial exposition at Nashville, Tenn., various railroads issued low rate nontransferable return tickets to that point.—*Held*, that an injunction restraining ticket brokers from buying and selling the return coupons of such tickets was proper.—*Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. 65.

[23] Wrongful use of special tickets by passengers.

A person who engages in the business of purchasing and selling non-transferable reduced rate tickets for profit to the injury of the railroad issuing the same commits an actionable wrong in that he interferes in a contract between two parties and induces one of them to break that contract to the injury of the other.—*Bitterman v. L. & N. R. Co.*, 207 U. S. 205, 28 Sup. Ct. R. (U. S.) 91, affg. s. c. 144 Fed. 34.

Where the contract under which a reduced rate round trip ticket is bought provides that the purchaser must before using the return portion of the ticket identify himself at the point of destination before the agent of the connecting line at such point, the said agent to sign, date and stamp the ticket, such ticket is not good for a return passage until these conditions shall have been complied with.—*Mosher v. St. L. I. M. & S. R. Co.*, 127 U. S. 390, 8 Sup. Ct. R. (U. S.) 1324.

The use of the return coupons of nontransferable excursion tickets by persons other than the original purchaser is a fraud upon the common carrier.—*Nashville, C. & St. L. R. Co., v. McConnell*, 82 Fed. 65.

§ 34. False billing,* [classification, weighing, report of weights], etc., by carrier or shipper.—No common carrier or any officer or agent thereof or any person acting for or employed by it, shall assist, suffer or permit any person or corporation to obtain transportation for any passenger, freight or property between points within this state at less than the rates then established and in force in accordance with the schedules filed and published in accordance with the provisions of this act, by means of false billing, false classification, false weight or weighing, or false report of weight, or by any other device or means. No person, corporation or any officer, agent or employee of a corporation, who shall deliver freight or property for transportation within the state to a common carrier, shall seek to obtain or obtain such transportation for such property at less than the rates then established and in force therefor, as aforesaid, by false billing, false or incorrect classification, false weight or weighing, false representation of the contents of a package, or false report or statement of weight, or by any other device or means, whether with or without the consent or connivance of the common carrier, or any of its officers, agents or employees.

For parallel provisions of Interstate Commerce Act,—see Interst. Com. Act, § 10, post, Appendix B.

Penalties and forfeitures for false billing, weighing, etc., by carrier, — see post, § 56.

* Words in brackets are not a part of section heading as enacted.—Ed.

Forfeiture and penalties for false billing, weighing, report of weight, weights, etc., by other than common carriers,—see post, § 58.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

Power of the state to regulate carriers' way of doing business,—see ante, § 1, note [2].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Purpose of acts regulating railroads,—see ante, § 1, note [32].

Who are common carriers,—see ante, § 2, notes [2]–[7].

What constitutes a railroad or street railroad,—see ante, § 2, note [3].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

[1] Responsibility of carriers.

Carriers and their agents should be held strictly responsible for the shipment of goods only upon correct weights, classification and billing.—*In re Underbilling*, 1 Inters. Com. R. 813, 1 I. C. C. R. 633.

[2] Underbilling as a form of discrimination.

Underbilling is an unjust discrimination.—*In re Underbilling*, 1 Inters. Com. R. 813, 1 I. C. C. R. 633.

[3] Limitation of liability by under-classification.

Limitation of liability by under-classification, if made with the assent of the shipper to secure him a lower rate, is valid.—*Douglass v. Minnesota Transfer R. Co.*, 62 Minn. 288, 64 N. W. 899, 30 L. R. A. 860.

[4] Effect of under-classification.

After a carrier has contracted to discriminate unlawfully by under-classification it cannot raise the classification and demand the additional charges.—*Illinois Cent. R. Co. v. Seitz*, 214 Ill. 350, 73 N. E. 585.

[5] What is false description.

The words "falsely described" in the Interstate Commerce Act do not mean a mere incorrect description. The penalties of the law are not intended for those who, in good faith, incorrectly describe or bill goods.—*Atchison, T. & S. F. R. Co. v. Goetz Mfg. Co.*, 51 Ill. App. 151.

[6] Determination of correctness of weights.

The correctness of weights for purposes of shipment is one of fact to be determined in a manner just to both parties and as to which the *ex parte* action of either cannot conclude the other.—*Potter Mfg. Co. v. Ch. & G. T. R. Co.*, 4 Inters. Com. R. 223, 5 I. C. C. R. 514.

[7] What practices improper.

To put fire, building and paving bricks in different classes would promote false billing by shippers.—*Stowe-Fuller Co. v. Pa. Co.*, 12 Inters. Com. R. 253.

Billing of cotton at a proper estimated weight per bale should not be deemed unlawful when actual weights cannot be ascertained without great inconvenience to the shipper or carrier, and when charges are promptly adjusted by the carrier upon the basis of actual weights furnished by the consignee.—*Phelps v. Tex. & P. R. Co.*, 6 Inters. Com. R. 36.

Use of hypothetical standards of weights, out of proportion to the actual weights, is unlawful, if it enables tank shippers to get more oil carried for the same money than barrel shippers.—*Rice v. Cincinnati, W. & B. R. Co.*, 3 Inters. Com. R. 841, 5 I. C. C. R. 193.

Hay is a generic term covering all kinds of hay, and the Interstate Commerce Act cannot be evaded by shipping some at a lower rate as "old hay."—*Missouri, K. & T. R. Co. v. Bowles*, 1 Ind. Ter. 250, 40 S. W. 899.

[8] Criminal liability.

False billing, classification, weighing, etc., a misdemeanor,—see post, §§ 56, 58.

Shippers of lumber may be convicted for false weighing, etc., upon a showing that their servants procured the unlawful discrimination in rates therein charged.—*U. S. v. Howell*, 56 Fed. 23.

For a jury to convict under an indictment which charges, under Interst. Com. Act, § 10, a conspiracy between certain lumber merchants and their employees, and an employee of a railroad company, to procure less than the established rates by false weighing of lumber shipped, such false weighing being done by the railroad employees the jury must find an agreement and combination for the purpose, and an overt act, the actual false weighing. Proof of separate overt acts will not show more than one offense, where the agreement and combination was continuous.—*U. S. v. Howell*, 56 Fed. 23.

[9] Gist of offense.

The gist of the offense of false billing, under the Interstate Commerce Commission Act, is the fraudulent act by which the lower rate is obtained, and the offense is complete when and where such act has been committed, the property delivered for transportation, and the contract for the illegal rate secured.—*Davis v. U. S.*, 104 Fed. 136.

[10] Indictment.

An indictment alleging the giving of rebates is not sufficient to charge a crime under the clause of Interst. Com. Act, § 2, which provides that no carrier shall, by false billing, false classification, false weighing or any other device or means permit any shipper to obtain transportation at less than the regular rates.— *U. S. v. Hanley*, 71 Fed. 672.

§ 35. Discrimination prohibited; connecting lines.

— Every common carrier is required to afford all reasonable, proper and equal facilities for the interchange of passenger, freight and property traffic between the lines owned, operated, controlled or leased by it and the lines of every other common carrier, and for the prompt transfer of passengers and for the prompt receipt and forwarding of freight and property to and from its said lines; and no common carrier shall in any manner discriminate in respect to rates, fares or charges or in respect to any service or in respect to any charges or facilities for any such transfer in receiving or forwarding between any two or more other common carriers or between passengers, freight or property destined to points upon the lines of any two or more other common carriers or in any respect with reference to passengers, freight or property transferred or received from any two or more other common carriers. This section shall not be construed to require a common carrier to permit or allow any other common carrier to use its tracks or terminal facilities. Every common carrier, as such, is required to receive from every other common carrier, at a connecting point, freight cars of proper standard, and haul the same through to destination, if the destination be upon a line owned, operated or controlled by such common carrier, or if the destination be upon a line of some other common carrier, to haul any car so delivered through to the connecting point upon the line owned, operated, controlled or leased by it, by way of route over which such car is billed, and there to deliver the same to the next connecting carrier. Nothing in this section shall be construed as in anywise limiting or modifying the duty of a common carrier to establish joint rates, fares and charges for the transportation of passengers, freight and property over the lines owned, operated, controlled and leased by it and the lines of other common carriers, nor as in any manner limiting or modifying the power of the commission to require the establishment of

such joint rates, fares and charges. A railroad corporation and a street railroad corporation shall not be required to interchange cars except on such terms and conditions as the commission may direct.

Provisions of the Interstate Commerce Act forbidding discrimination between connecting carriers,—see Interst. Com. Act, § 3, post, Appendix B.

Criminal liability of interstate carriers,—see Interst. Com. Act, § 10, Elkins Act, § 1, post, Appendix B.

Power of the Interstate Commerce Commission to establish through routes and joint rates,—see Interst. Com. Act, § 15, post, Appendix B.

Provisions of N. Y. Railroad Law as to furnishing of facilities, etc., to connecting carriers,—see N. Y. R. R. L., § 35.

Liability of railroad for transportation and delivery of passengers or freight received by it to be transferred to points on connecting roads,—see N. Y. R. R. L., § 48.

Duty of street surface railroads to give transfers at connecting points,—see N. Y. R. R. L., § 104.

Power of railroad corporations organized under the N. Y. Rapid Transit Act as to crossing and intersecting other railway lines,—see N. Y. Rap. Tr. Act, § 24, subd. 3, post, Appendix A.

Construction of connecting railroads under New York Rapid Transit Act,—see N. Y. Rap. Tr. Act, §§ 32, 32a, post, Appendix A.

Common carriers shall file with the Commission sworn copies of all traffic arrangements with other carriers,—see ante, § 30, subd. 2.

Duty of carriers not to subject particular traffic to undue prejudice,—see also ante, §§ 31, 32.

Duty of carriers to furnish sufficient and suitable cars,—see post, § 37.

Actions by aggrieved persons for loss or damage from failure to furnish facilities for interchange of traffic between connecting lines,—see post, § 40.

Power of Commission to establish through routes and joint rates,—see post, § 49.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Purpose of acts regulating railroads,—see ante, § 1, note [32].

Who are common carriers,—see ante, § 2, notes [2]–[7].

What constitutes a railroad or street railroad,—see ante, § 2, note [8].

Withholding through rates as form of discrimination against shippers,—see ante, § 32, note [23].

Liability of carriers on through shipments,—see post, § 38, note [12].

Limitation of liability on through shipments,—see post, § 38, note [15].

[1] Extending of equal rates and facilities to connecting carriers — In general.

Duty of railroads to furnish accommodations on equal terms to connecting railroads,—see N. Y. R. R. L., § 35.

What carriers charged with duty,—see post, note [11].

Meaning of term “rate,”—see ante, § 26, note [26].

Discretion of carrier in fixing rates,—see ante, § 26, note [28].

Duty to charge rates reasonable in themselves,—see ante, § 26, note [29].

General duty of carriers not to unduly discriminate as to rates,—see ante, § 31, note [1].

General duty of carriers not to discriminate in giving of facilities,—see ante, § 32, note [1].

Power of Commission to determine as to rates,—see post, § 49, notes [6]–[12].

Mandamus to compel furnishing of equal facilities to connecting carriers,—see post, § 57, note [13].

Instructions to a receiver operating a common carrier were: “He will not discriminate in his rates and facilities against any connecting line, but will give to both equal rates and facilities for equal service, from all points.”—*Cutting v. Florida R. & N. Co.*, 30 Fed. 663.

While a carrier under the law may decline to join with its connections in the making of joint through routes and rates applicable thereon, or may join in such arrangements with one connection and refuse to do so with another, no carrier can for any reason or purpose lawfully exact unreasonable and unjust rates for any service it may render under any through route arrangement it may make.—*Matter of Alleged Unlawful Discrimination*, 11 Inters. Com. R. 587.

Whatever rights and privileges, other than those of a natural person, are claimed by one railroad against a connecting company, must, in the absence of statute, be found in the charters of the companies or arise from contract.—*Shelbyville R. Co. v. Louisville C. & L. R. Co.*, 82 Ky. 541.

A common carrier is as much bound to carry for another carrier as it is to carry for other persons who offer goods for transportation.—*Louisville & N. R. Co. v. Central Stock Yards Co.*, 30 Ky. L. R. 18, 97 S. W. 778.

[2] — Interchange of traffic at junction points.

Duty to receive and forward passengers and freight from junction points,—see N. Y. R. R. L., § 34.

Issuance of transfers by street railroads,—see ante, § 26, notes [58]–[72].

Carriers may be required to transfer freight without breaking bulk,—
see post, § 39, note.

Power of Commission to fix terms for interchange of traffic by connecting carriers,—see post, § 49, note [14].

The provision in the Colorado Constitution which prohibits "unreasonable discrimination in rates or facilities" does not, in the absence of legislation, require a railroad which has made arrangements with a connecting road for the handling of joint business at a union station at the junction point, to make similar arrangements with a rival connecting line at an adjacent junction point.—*Atchison, T. & S. R. Co. v. D. & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. R. (U. S.) 185, revg. s. c. 13 Fed. 546.

Interst. Com. Act, § 3, providing that a railroad shall extend equal facilities to all connecting carriers, means that where a railroad subject to the provisions of the Act has provided and established at any given place its facilities in the shape of yards, stations and depots for the interchange of traffic, or for the receiving, forwarding or delivering of passengers and property, and affords such facilities to some of its connecting lines at that point, the same proper, reasonable and equal facilities for such interchange, or for receiving, forwarding and delivery of passengers and property must be extended to other connecting lines at that point; and a company making a physical connection at a point other than that at which the established road has already provided its facilities and conducts its interchange with other connecting lines, cannot demand or require an interchange of freight at such point of physical connection, without first furnishing at such point reasonable and proper facilities for the interchange sought.—*Kentucky & I. Bridge Co. v. L. & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289.

[3] — Contracts for through routes, rates, etc.

A carrier may contract with one connecting carrier for through traffic, through billing, division of through rates, etc., without being obligated to enter into a similar contract with another connecting carrier.—*Gulf, C. & S. F. R. Co. v. Miami Ss. Co.*, 86 Fed. 407.

There is no principle of common law which prevents a carrier from selecting from two or more railroads, one which it will employ in sending shipments beyond its own lines, on through bills of lading, or as their agent to receive freight and transmit it on through bills to their own line, without breaking bulk. To make such an arrangement for the interchange of passengers and freight is not a contract in unlawful restraint of trade under the Sherman Act. The Interstate Commerce Act has not taken away the right of a carrier to make such arrangements.—*Prescott & A. C. R. Co. v. A. T. & S. F. R. Co.*, 73 Fed. 438, explaining, *New York & N. R. Co. v. N. Y. & N. E. R. Co.*, 50 Fed. 867.

Neither public policy nor any provision of statute forbids a carrier engaged in interstate commerce from making an exclusive contract with a railroad, whose route connects with and extends beyond that of such railroad company, for through billing and rating over the connecting lines, and by which such carrier is given the exclusive right to receive from the rail company and forward freights destined to points beyond the line of such railroad.—*St. Louis Co. v. L. & N. R. Co.*, 65 Fed. 39.

Under Interst. Com. Act, § 3, when a carrier enters into an arrangement with another carrier for through billing and rating and for the use of its tracks and terminals, it is not compelled to make the same arrangement with all other connecting carriers if the facilities for interchange of traffic are the same, especially without reference to the question whether the proposed arrangement is of material advantage to the public.—*Little Rock & M. R. Co. v. St. L. S. W. R. Co.*, 63 Fed. 775, 26 L. R. A. 192, affg. s. c. 59 Fed. 400.

When a carrier, by private arrangement, forms a through route, and establishes joint through rates, fares or charges with certain connecting lines, it is not compelled to concede to all other connecting railroads the same or equal through rates on traffic which the latter may offer for transportation.—*Kentucky & I. Bridge Co. v. L. & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289.

A railroad may make through rates with one steamboat line and refuse to make such rates with another at the same point. It cannot refuse to receive and deliver freight to both lines.—*Capehart v. L. & N. R. Co.*, 3 Interst. Com. R. 278, 4 I. C. C. R. 265.

[4] — Wharf and terminal facilities.

Wharfage not interstate commerce,—see ante, § 25, note [6].

Where a carrier has erected a wharf which it uses to enable it to continue transportation beyond its line, over the line of a certain steamship company, another carrier has no right to demand the use of such wharf for the purpose of forwarding goods by a line of steamers other than that patronized by the owner of the wharf, such owner having sufficient yards and depots elsewhere for the handling of freight and passengers; and the fact that the wharf was erected at the foot of a street under authority from the city is immaterial.—*Louisville & N. R. Co. v. West Coast Co.*, 198 U. S. 483, 25 Sup. Ct. R. (U. S.) 745.

A contract between a railroad company and a city, and a state statute, giving the right to all other railroads to use its terminal facilities, does not contravene the provision of the Interst. Com. Act, § 3, providing that the section shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in the same business.—*State v. Chicago, M. & St. P. R. Co.*, 33 Fed. 391.

A railroad may contract with one of two rival steamboat companies that such company shall have exclusive use of the railroad's terminal facilities at a given point.—*Alexandria Bay Co. v. N. Y. C. & H. R. R. Co.*, 18 App. Div. (N. Y.) 527, 45 N. Y. Supp. 1091.

[5] — Hauling of cars of connecting carrier.

Power of Commission to compel interchange of cars,—see post, § 49, note [14].

That a car is a refrigerator car, not usually or most advantageously used for the kind of freight contained therein, does not justify refusal to accept such a car from a connecting carrier.—*Gulf, C. & S. F. R. Co. v. Long Star Co.*, 26 Tex. Civ. App. 531, 63 S. W. 1025.

Penalties and damages may be recovered for refusal to accept a car of freight from a connecting carrier.—*Gulf, C. & S. F. R. Co. v. Lone Star Co.*, 26 Tex. Civ. App. 531, 63 S. W. 1025.

[6] — Prepayment of charges.

Right of carrier to prepayment of charges,—see ante, § 26, note [51].

The common law does not require a common carrier, in furnishing equal facilities, to advance money to all connecting carriers on the same terms; nor to give credit for the carriage of articles of trade and commerce to all connecting carriers because it extends credit for services to others.—*Southern Ind. Exp. Co. v. U. S. Exp. Co.*, 88 Fed. 659.

There is no principle of the common law requiring a common carrier receiving articles of trade and commerce from a connecting line to advance or assume the payment to the connecting line of the charges accrued thereon for the transportation of such articles from the point of origin; nor to transport the goods tendered without prepayment therefor.—*Southern Ind. Exp. Co. v. U. S. Exp. Co.*, 88 Fed. 659.

A railroad engaged in interstate transportation has a right both at common law and under the Interstate Commerce Act to demand prepayment of freight when delivered to it by one connecting carrier, without exacting such prepayment when delivered by another connecting carrier; and may advance freight charges to one such carrier without doing so to the other.—*Gulf, C. & S. F. R. Co. v. Miami Ss. Co.*, 86 Fed. 407.

An interstate carrier does not subject another carrier to an unreasonable disadvantage under Interst. Com. Act, § 3, by exacting of that carrier the prepayment of freight on all property received from it at a station, while it does not require charges to be paid in advance on freight received from other individuals and corporations at such station.—*Little Rock & M. R. Co. v. St. L. S. W. R. Co.*, 63 Fed. 775, 26 L. R. A. 192, affg. s. c. 59 Fed. 400.

Where a railroad demands prepayment of freight and car mileage on property brought over the line of a connecting carrier from certain localities while it does not demand such prepayment on property brought by the connecting carrier from other localities, there is no unreasonable discrimination as to receiving and forwarding of freight in violation of Interst. Com. Act, § 3.—*Oregon S. L. & U. N. R. Co. v. N. Pac. R. Co.*, 61 Fed. 158, affg. s. c. 51 Fed. 465.

[7] — Embargo.

Power of Commission as to embargos,—see post, § 49, note [15].

A carrier may, under special circumstances, to avoid congestion in its freight yards, enforce an embargo rule against certain classes of freight coming from other lines, although not issuing an embargo against such freight when it originates on its own line.—*Daish v. Cleveland A. & C. R. Co.*, 9 Inters. Com. R. 513.

[8] Limit of common-law duty to transport.

At common law a carrier is not bound to undertake to transport goods beyond the terminal points reached by its own conveyances.—*Atchison, T. & S. F. R. Co. v. D. & N. O. R. Co.*, 110 U. S. 667, 3 Sup. Ct. R. (U. S.) 667; *Erie R. Co. v. Wilcox*, 84 Ill. 239; *People v. Ch. & A. R. Co.*, 55 Ill. 95; *Pittsburg, C. & St. L. R. Co. v. Morton*, 61 Ind. 539.

Where a carrier has, by building stockyards, or by contract with a stockyards company, made adequate provision for the performance of its duty as a common carrier, it is not required by the common law to make delivery of stock consigned to such city to connecting roads for delivery to other stockyards therein.—*Central Stock Yards v. L. & N. R. Co.*, 118 Fed. 113, 63 L. R. A. 213; affd. 192 U. S. 568, 24 Sup. Ct. R. (U. S.) 339.

At common law, in the absence of a special contract, a carrier performs his whole duty by transporting goods to the end of its own route and delivering them to the next connecting carrier.—*Babcock v. L. S. & M. S. R. Co.*, 49 N. Y. 491, revg. s. c., 43 How. Pr. (N. Y.) 317; *Root v. Gt. Western R. Co.*, 45 N. Y. 524, revg. s. c. 2 Lans. (N. Y.) 199.

The fact that a carrier has connections with other routes, extending beyond its own termini, which it does not operate, control, or own, does not, at common law, make it liable for a refusal to ship goods over those routes.—*Pittsburg, C. & St. L. R. Co. v. Morton*, 61 Ind. 539.

[9] Public control.

General power of the state to regulate property devoted to public use,
—see ante, § 1, notes [1]–[22].

General power of the state to regulate rates and charges,—see ante, § 1, note [2].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

An order of the North Carolina Corporation Commission compelling a railroad to run its trains so as to make connections with trains of another road is an order coming clearly within the scope of the power to enforce just and reasonable regulations.—*Atlantic C. L. R. Co. v. N. C. Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. R. (U. S.) 585, affg. s. c. 137 N. C. 1, 49 S. E. 191.

An Act of the Minnesota Legislature, creating a railroad and warehouse commission, is not unconstitutional in that it assumes to establish joint through rates on traffic over the lines of independent connecting roads, and to arbitrarily apportion and divide joint earnings.—*Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. R. (U. S.) 900, affg. s. c. 80 Minn. 191, 83 N. W. 60.

A state railroad commission has the power to pass upon the reasonableness of a contract between connecting carriers.—*Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. R. (U. S.) 900, affg. s. c. 80 Minn. 191, 83 N. W. 60.

A common carrier cannot be compelled to receive from, and transport for, a connecting line, a car defective in safety appliances.—*Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. R. (U. S.) 491, affg. s. c. 19 D. C. 282; *Wilson v. Atlantic C. L. R. Co.*, 129 Fed. 774; affd. 133 Fed. 890; *Felton v. Bullard*, 94 Fed. 781; *Chicago, M. & St. P. R. Co. v. Wallace*, 66 Fed. 506, 30 L. R. A. 161n; *Oregon S. L. & U. N. R. Co. v. No. Pac. R. Co.*, 51 Fed. 465; affd. 61 Fed. 158; *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 412, 71 N. W. 42; *Pennsylvania R. Co. v. Snyder*, 55 Oh. St. 342, 45 N. E. 559.

In the absence of statutory provision, the interchange of traffic between two connecting railroads is a matter for contract between them, and the courts have no power to compel such exchange or to fix the terms on which it shall be made. No such power is conferred on the courts by the Interstate Commerce Act.—*Northern Pac. R. Co. v. Washington Territory*, 112 U. S. 492, 12 Sup. Ct. R. (U. S.) 283; *Express Cases*, 117 U. S. 1, 6 Sup. Ct. R. (U. S.) 542, 628; *Pullman Palace Car Co. v. Mo. Pac. R. Co.*, 115 U. S. 587, 6 Sup. Ct. R. (U. S.) 194; *Atchison, T. & S. F. R. Co. v. D. & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. R. (U. S.) 185, revg. s. c. 13 Fed. 546; *Central Stockyards Co. v. L. & N. R. Co.*, 118 Fed. 113, 63 L. R. A. 213; affd. 192 U. S. 568, 24 Sup. Ct. R. (U. S.) 339; *Allen v. Oregon R. & N. Co.*, 98 Fed. 16; *St. Louis Drayage Co. v. L. & N. R. Co.*, 65 Fed. 39; *Oregon S. L. & U. N. R. Co. v. No. Pac. R. Co.*, 51 Fed. 465; affd. 61 Fed. 158; *Little Rock & M. R. Co. v. St. L. I. M. & S. R. Co.*, 41 Fed. 559; *Kentucky & I. Bridge Co. v. L. & N. R. Co.*, 37 Fed. 657, 2 L. R. A. 289.

The court has no power, at common law or under the Interstate Commerce Act, to compel a railroad to make a contract with another company for a joint through rate and joint through routing of freight and passengers.—*Express Cases*, 117 U. S. 1, 6 Sup. Ct. R. (U. S.) 542, 628; *Pullman Palace Car Co. v. Mo. Pac. R. Co.*, 115 U. S. 587, 6 Sup. Ct. R. (U. S.) 194; *Atchison, T. & S. F. R. Co. v. D. & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. R. (U. S.) 185, revg. s. c. 13 Fed. 546; *Little Rock & W. R. Co. v. St. L. I. M. & S. R. Co.*, 41 Fed. 559; *Kentucky & I. Bridge Co. v. L. & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289.

No power exists at common law, and none is given by the Interstate Commerce Act, to compel connecting railroads to unite in a joint tariff, or to enter into a through rate arrangement for transportation, unless they desire to do so.—*Interst. Com. Commission v. C. N. O. & T. P. R. Co.*, 56 Fed. 925; *Chicago & N. W. R. Co. v. Osborne*, 52 Fed. 925, revg. s. c. 48 Fed. 49; certiorari denied, 146 U. S. 354, 13 Sup. Ct. R. (U. S.) 281; *Little Rock & M. R. Co. v. St. L. I. M. & S. R. Co.*, 41 Fed. 559; *Kentucky & I. Bridge Co. v. L. & N. R. Co.*, 37 Fed. 630.

If the public is to have the legitimate benefit of water competition, some regulating body must exercise in our country, as does the English Railway Commission in England, the authority to establish through routes between water and rail carriers, or at least to prevent undue discrimination by rail carriers between connecting water lines.—*Matter of Alleged Unlawful Discriminations*, 11 Inters. Com. R. 587.

The legislature has the power to compel the interchange of cars, and traffic between a steam railroad and a street electric railroad.—*Hudson Valley R. Co. v. Boston & M. R. Co.*, 106 App. Div. (N. Y.) 375, 94 N. Y. Supp. 545, affg. s. c. 45 Misc. (N. Y.) 520, 92 N. Y. Supp. 928.

Neither under the statutes of Florida nor under the common law can a railroad be compelled to transport freight over the line of another railroad which it does not own, control or operate, when it does not hold itself out as transporting freight over such line.—*State v. L. & N. R. Co.*, 51 Fla. 311, 40 So. 885.

Railroads cannot be compelled to acquire facilities to handle and deliver freight beyond their own lines.—*People ex rel. Hempstead v. Ch. & A. R. Co.*, 55 Ill. 95.

The legislature may, when not forbidden by the organic law, regulate the business relations between connecting lines of railroads.—*Shelbyville R. Co. v. Louisville C. & L. R. R. Co.*, 82 Ky. 541.

Not only has a constitutional convention the power to impose regulations upon all railroads within the state, requiring interchanges of cars and switching at points of physical connection, in receiving and delivering freight, and the use of their terminals for such purpose, but under the general police power of the state performance of such duties can be compelled by legislative enactment alone.—*Louisville & N. R. Co. v. Central Stockyards Co.*, 30 Ky. L. R. 18, 97 S. W. 778.

Even though a carrier furnishes its own stockyards, where a connecting line furnishes ample facilities for loading and unloading, and yards are erected on the line of the latter, so that the former may deliver stock with equal safety at said yards, delivery at the yards on such connecting line may be compelled.—*Louisville & N. R. Co. v. Central Stockyards Co.*, 30 Ky. L. R. 18, 97 S. W. 778.

Under the laws of Minnesota, the Railroad and Warehouse Commission of that state has the power to compel the enforcement of joint through rates by connecting carriers between points within the state.—*State v. Minneapolis & St. L. R. Co.*, 80 Minn. 191, 83 N. W. 60.

Under a statute of North Carolina providing that the Corporation Commission should have such general control over carriers as was necessary to carry into effect the provisions of the act and further providing that all carriers should afford all reasonable, proper and equal facilities for interchange of traffic with connecting carriers and for the forwarding and delivering of passengers and freight to and from their lines and those connecting therewith, and that connecting lines should make as close connection as practicable for the convenience of the traveling public, the Commission may compel a railroad to make its trains connect with those of another railroad, even though by so doing the railroad is subjected to a greater expense, since the statute does not refer to mere physical connections.—*North Carolina Corp. Commission v. Atlantic C. L. R. Co.*, 137 N. C. 1, 49 S. E. 191; *affd.* 206 U. S. 1, 27 Sup. Ct. R. (U. S.) 585.

[10] State or federal regulation.

Receiving interstate shipments from connecting carrier makes a railroad wholly within a state engaged in interstate commerce,—see ante, § 25, note [7].

Statute compelling connecting carrier to trace freight shipped over its line not a regulation of interstate commerce,—see ante, § 25, note [16].

Whether compelling the transfer of cars by connecting carriers is a regulation of interstate commerce,—see ante § 25, note [16].

The General Laws of Minnesota, ch. 91, § 3, required all common carriers to provide, at points where their tracks intersect at grade, ample and equal facilities for transferring cars, freight, passengers, etc. A court order compelling erection of tracks, etc. in compliance with this order was upheld. Although it provides facilities for interstate commerce, it is not a regulation of interstate commerce, within federal control.—*Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. R. (U. S.) 115.

A state is without power to compel a railroad company to transfer cars of livestock to a connecting road at a point of intersection within the state, where the shipment was received in another state and is, there-

fore, interstate commerce.—*Central Stockyards Co. v. L. & N. R. Co.*, 118 Fed. 113, 63 L. R. A. 213; *affd.* 192 U. S. 568, 24 Sup. Ct. R. (U. S.) 339.

If the installing of a connecting switch to facilitate the transfer of cars from one road to another at an intersection point, would be of advantage to both state and interstate traffic, either the state or federal commission may order such switch.—*Jacobson v. Wisconsin, M. & P. R. Co.*, 71 Minn. 514, 74 N. W. 893.

[11] What carriers charged with duty.

An Indiana statute providing for connections between railroads and the granting of facilities to the connecting carriers, does not apply to express companies which do not own, control or operate a railroad line.—*Southern Ind. Exp. Co. v. U. S. Exp. Co.*, 88 Fed. 659; *affd.* 92 Fed. 1022.

The lines of defendant railway were the means of connection and transfer of cars, etc., between two other lines.—*Held*, that the failure or refusal of defendant to switch and transfer cars between such lines does not make it liable under a statute requiring railways to receive and transport freight coming to and from connecting lines.—*Gulf & I. R. Co. v. Texas & N. O. R. Co.*, 93 Tex. 482, 56 S. W. 328, *affg.* s. c. 54 S. W. 1031.

[12] Making of through routes.

Power of carriers to establish through routes,—see ante, § 30, note [1].
“Through routes” and “through rates” defined,—see ante, § 30, note [2].

Long and short haul section applies to through routes,—see post, § 36, note [2].

Power of Commission to order through routes and through rates,—see post, § 49, note [24].

At common law a carrier may confine its business entirely to its own lines and need not make its line part of any through route to or from a point off its line unless it so chooses.—*In the Matter of Through Routes and Through Rates*, 12 Inters. Com. R. 190.

That cars passing off its own lines might come into the possession of carriers who would not promptly return them, may justify refusal to establish joint rates and through routes.—*American Nat. Live Stock Assn. v. Tex. & P. R. Co.*, 12 Inters. Com. R. 37.

[13] Through traffic a matter of contract.

When agreement for through transportation exists,—see ante, § 30, note [3].

When through route and through rates exist,—see ante, § 30, note [4].

What constitutes a through shipment,—see ante, § 31, note [72].

Even after the tracks of two railroads have been physically connected the making of joint rates is a matter primarily for the companies interested.—*Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. R. (U. S.) 115.

The interchange of traffic between connecting lines constituting a through route is always a matter of contract between the several companies operating such lines; and such arrangements are, in the absence of express agreement to the contrary, terminable at the pleasure of either party.—*Kentucky & I. Bridge Co. v. L. & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289.

A railroad that has a running arrangement over the tracks of another is not compelled to receive or discharge local traffic along the lines of the latter, its obligations being wholly those arising from the contract.—*Alford v. Ch. R. I. & P. R. Co.*, 2 Inters. Com. R. 582, 771, 3 I. C. C. R. 473.

A rule of an express company provided that agents at points where other express companies had offices, must decline to receive goods to be transported to a point where such other companies had exclusive offices.—*Held*, that such a rule was not justified, especially where the route of the company which had an exclusive office at the destination point was circuitous and much speedier service could be rendered by the company making such rule, by forming a through route with other express companies reaching the destination point, and where it appeared that direct through routes and joint tariff rates had been established by the railroads over which express matter would be sent by the latter route.—*Herendeen v. U. S. Exp. Co.* Decided by the N. Y. Public Service Commission of the Second District, Feb. 18, 1908.

[14] Consent of carrier to making of through route or rate.

One carrier cannot make a through route or rate over the lines of a connecting carrier without the latter's consent.—*New York, N. H. & H. R. Co. v. Platt*, 7 Inters. Com. R. 323.

[15] Charter provisions.

A power given in a charter of a railroad to connect or unite with other roads merely refers to a physical connection of the tracks, and does not authorize the purchase, or even the lease of such roads or road, or any joinder of franchises.—*Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. R. (U. S.) 714, affg. s. c. 97 Ky. 675, 17 Ky. L. R. 427, 31 S. W. 476.

The provision of the charter of a railroad that it shall be the duty of such company to permit any other railroad to form running connections with it on fair and equitable terms includes only such arrangements as to the time of arrival and departure of trains, and as to stations, plat-

forms and other facilities, as will enable companies desiring to connect to do so without detriment or serious inconvenience.—*Oregon S. L. & U. N. R. Co. v. No. Pac. R. Co.*, 61 Fed. 158, affg. s. c. 51 Fed. 465.

A clause of the charter of a railroad which authorizes other railroads to make connections with its line of road, authorizes merely a physical connection and not a business connection, requiring an interchange of traffic at the point of junction.—*Kentucky & I. Bridge Co. v. L. & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289.

[16] What constitutes a discrimination between connecting lines.

Secrecy of a rate not the test of its lawfulness,—see ante, § 31, note [12].

Where a railroad which has extended the same rates to goods transported over two connecting carriers, withdraws the former rate as to one only and makes a greater rate on goods transferred over that line, there is an unjust discrimination.—*Augusta S. R. Co. v. Wrightsville & T. R. Co.*, 74 Fed. 522.

Where a company operates a steamboat line and a railroad as a continuous line, the refusal of such company to permit a rival steamboat company to land at its dock is not an unjust discrimination within the meaning of Interst. Com. Act, § 3, forbidding discrimination between connecting carriers.—*Ilwaco R. & N. Co. v. Oregon S. L. & U. N. R. Co.*, 57 Fed. 673, revg. s. c. 51 Fed. 611.

Analysis of what constitutes discrimination between connecting carriers.—*Little Rock & M. R. Co. v. E. Tenn. V. & G. R. Co.*, 47 Fed. 771; appeal dismissed, 159 U. S. 698, 16 Sup. Ct. R. (U. S.) 189.

It is not an unjust discrimination or preference to make through rates with one steamboat line and refuse to make such rates with another.—*Capehart v. L. & N. R. Co.*, 3 Interst. Com. R. 278, 4 I. C. C. R. 265.

A contract between a railroad and one of two rival steamboat companies whereby that company has exclusive use of the railroad's terminal facilities does not violate Interst. Com. Act, § 3.—*Alexandria Bay Co. v. N. Y. C. & H. R. R. Co.*, 18 App. Div. (N. Y.) 527, 45 N. Y. Supp. 1091.

Issuing through bills of lading to one carrier and refusing the same to another is not an unjust discrimination.—*State v. Wrightsville & T. R. Co.*, 104 Ga. 437, 30 S. E. 891.

[17] Justification and excuse for refusal.

The receiver of a railroad cannot refuse to receive from and deliver to a connecting road loaded or empty freight cars because by doing so his own road will become involved in a strike in progress on the connecting road.—*Beers v. Wabash, St. L. & P. R. Co.*, 34 Fed. 244.

If a railroad company cannot secure other than an unreasonably low share of the joint rate to seaport on another road, it may be justified in declining to join in such a rate, especially when it can take the traffic to a seaport reached by its own road; but a carrier engaged in transportation over the through line finds no such justification when it is able to secure for itself a share of the joint rate which fully equals the rate established by it for purely local service over like distances on its own road.—*Savannah Bureau v. L. & N. R. Co.*, 8 Inters. Com. R. 377.

That the public has adequate facilities without such interchange of traffic, does not justify refusal to interchange, as all railroads created by public authority are conclusively deemed to be public conveniences.—*Kentucky & I. Bridge Co. v. L. & N. R. Co.*, 1 Inters. Com. R. 703, 715, 2 Inters. Com. R. 102, 2 I. C. C. R. 162.

A railroad is not excused from obeying a constitutional provision requiring all railroads to receive freight from and deliver to connecting carriers at points of physical connection, merely because by doing so it would be subjected to inconvenience or increased expense.—*Louisville & N. R. Co. v. Central Stockyards Co.*, 30 Ky. L. R. 18, 97 S. W. 778.

That it would reduce the carrier's revenues so as to make part or all its business unprofitable, is not a valid defense to an order of a state commission for a connecting switch.—*Jacobson v. Wisconsin, M. & P. R. Co.*, 71 Minn. 514, 74 N. W. 893.

[18] What are connecting or through lines.

A through line for traffic, through rates, through bills of lading, etc., do not necessarily follow from a physical connection of tracks. Whether a connecting business shall be done upon them after the union depends on legislative regulation or contract obligation.—*Alchison, T. & S. F. R. Co. v. D. & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. R. (U. S.) 185, revg. s. c. 13 Feb. 546.

Forming "a continuous line of railroad with each other" means a line or route extending and continuing in substantially the same general direction.—*People v. Boston, H. T. & W. R. Co.*, 12 Abb. N. C. (N. Y.) 230.

Mere switch connections are not connecting lines.—*Gulf & I. R. Co. v. Texas & N. O. R. Co.*, 54 S. W. 1031; affd. 93 Tex. 482, 56 S. W. 328.

[19] Compelling connections.

If a switch connection is within the power of the state commission to order, it may take into account the benefit to both interstate and state traffic in determining the necessity therefor.—*Jacobson v. Wisconsin, M. & P. R. Co.*, 71 Minn. 514, 74 N. W. 893.

[20] Right to make connections.

A contract was entered into between three street railroad companies by which it was agreed that the tracks of two of the companies were to be

connected by a curve to be built by the third company in consideration of the right granted it to use the tracks of the first mentioned companies and the connecting curve.—*Held*, that the third company had the same right to construct the connecting curve that the other two companies had.—*Kunz v. Brooklyn Heights R. Co.*, 25 Misc. (N. Y.) 334, 54 N. Y. Supp. 187.

[21] Bill of lading as a facility which may be compelled.

General duty of carrier to give bill of lading.—see post, § 38, note [1].

Bill of lading is a "facility," the furnishing of which can be compelled by mandamus, under the section of the Interstate Commerce Act requiring carriers to furnish "equal facilities" to connecting carriers.—*Augusta S. R. Co. v. Wrightsville & T. R. Co.*, 74 Fed. 522.

A carrier cannot be compelled by a shipper to give a bill of lading beyond its own line.—*Lotspiech v. Central R. & B. Co.*, 73 Ala. 306.

[22] Honoring of tickets.

In the absence of some arrangement between connecting lines one line is under no obligation to honor tickets issued by the other.—*Oregon S. L. & U. N. R. Co. v. No. Pac. R. Co.*, 61 Fed. 158, affg. s. c. 51 Fed. 465.

A passenger ticket over connecting roads is a reasonable facility of travel.—*Chicago & A. R. Co. v. Pa. R. Co.*, 1 Inters. Com. R. 291, 293, 357, 1 I. C. C. R. 86.

A regulation by a railroad that it would not sell tickets over a connecting road unless the latter would abstain from paying commissions to the former's agents on sales made, is reasonable, and so valid.—*Chicago & A. R. Co. v. Pa. R. Co.*, 1 Inters. Com. R. 291, 293, 357, 1 I. C. C. R. 86.

[23] Construction of statutes and decrees — In general.

A decree giving one railroad joint and equal rights in the use of the right of way, terminal facilities, etc., does not convey the right to use the latter's industrial tracks, facilities, etc.—*St. Louis, K. C. & R. Co. v. Wabash R. Co.*, 152 Fed. 849.

A decree awarding a railway company the right to the use of terminal facilities along the right of way of another company does not include use of industrial tracks and terminal facilities subsequently constructed "off" such right of way.—*Central Trust Co. v. Wabash R. Co.*, 144 Fed. 476.

The provision of the Interst. Com. Act, § 3, that "this shall not be construed as requiring any such common carrier to give the use of its

tracks or terminal facilities to another carrier engaged in like business," refers only to facilities for interchanging traffic between connecting lines.—*Chicago F. P. Cov. Co. v. Ch. & N. W. R. Co.*, 8 Inters. Com. R. 316.

A provision that a carrier shall receive, deliver, transfer and transport all freight at any point where there is physical connection with the tracks of connecting carriers, can not be limited to mean that the carrier shall be required to transfer and deliver only such cars as it may receive from such connecting carrier.—*Louisville & N. R. Co. v. Central Stock-yards Co.*, 30 Ky. L. R. 18, 97 S. W. 778.

A statute requiring ample facilities for transfer of cars, etc., at intersections does not apply to crossings of private tracks.—*State v. Willmar & S. F. R. Co.*, 88 Minn. 448, 93 N. W. 112.

[24] — Meaning of term "transfer of freight, passengers or express matter."

The term "transfer of freight, passengers or express matter" from one carrier to another includes the transfer of cars from one road to another, as well as the transfer of freight or passengers from the cars of one road to the cars of another.—*Council Bluffs v. K. C. St. J. & C. B. R. Co.*, 45 Iowa, 338.

[25] Routing of goods by initial carrier.

Reservation by carrier of right to route goods,—see ante, § 28, note [28].

Routing of goods as undue prejudice against shipper,—see ante, § 32, note [21].

While it is the general duty of a carrier to forward goods by the usual and most direct route, the carrier may, in case of necessity, resort to such other reasonably direct route as is available under existing conditions to carry the freight to its destination.—*Empire State Cattle Co. v. A. T. & S. F. R. Co.*, 210 U. S. 1, 28 Sup. Ct. R. (U. S.) 607, affg. s. c. 147 Fed. 457.

At common law a carrier is not bound to carry beyond its own lines; if it contracts to carry beyond that, it may, in the absence of statutory regulations, choose the routes it will use in so doing.—*Atchison, T. & S. F. R. Co. v. D. & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. R. (U. S.) 185, revg. 13 Fed. 546.

[26] Goods to be forwarded in order of receipt.

In the forwarding of freight received from connecting lines it is proper that cars should be forwarded as far as practicable in the order of their receipt, so that there should be no unreasonable discrimination or preference which might be avoided.—*Daish v. Cleveland, A. & C. R. Co.*, 9 Inters. Com. R. 513.

[27] Division of joint rates.

The necessities of carriers often demand, and traffic conditions frequently warrant them in exacting, a share of through rates which gives them more per mile than that which results to a connecting carrier from the division accepted by it.—*Gustin v. A. T. & S. F. R. Co.*, 8 Inters. Com. R. 277.

[28] Amount of charges.

Two lines which are in fact one railroad may not charge for a through haul over their roads as if each were a separate line.—*Missouri Pac. R. Co. v. Kuthman*, 2 Tex. Ct. of App. Civ. Cases, § 465.

[29] Right to recover damages.

Connecting carrier discriminated against may sue at law and recover damages.—*Bigbee Packet Co. v. Mobile & O. R. Co.*, 60 Fed. 545.

Where two carriers at the same point of connection with a third are charged different rates by the latter for forwarding their freight, the one discriminated against may recover damages.—*Samuels v. L. & N. R. Co.*, 31 Fed. 57.

[30] Injunctions against discriminations.

Where a labor boycott has been declared against a railroad, and connecting carriers are refusing, or seemingly about to refuse, to afford equal facilities to the boycotted road, in violation of Interst. Com. Act, § 3, they may be compelled by injunction to afford equal facilities.—*Toledo, A. A. & N. M. R. Co. v. Pa. Co.*, 54 Fed. 746, 19 L. R. A. 395.

The courts will enforce by mandatory injunction the receiving of freights and passengers from connecting lines, as required by Interstate Commerce Act and laws of Iowa. A strike on the plaintiff's road and the fact that such receiving would cause a strike on the defendant's road in no defense.—*Chicago, B. & Q. R. Co. v. Burl. C. R. & N. R. Co.*, 34 Fed. 481.

The L. & N. R. Co. refused to transfer shipments of live stock to the line of the Southern R. Co. at their points of physical connection, and when stock was so billed it delivered the same at a stockyard on its own line.—*Held*, that an owner of a stockyard on the line of the Southern R. Co., whose business was injured by this practice, could maintain an action to enjoin such discrimination.—*Louisville & N. R. Co. v. Central Stockyards Co.*, 30 Ky. L. R. 18, 97 S. W. 778.

[31] Liability of carrier as to through transportation of passengers.

If a carrier sells tickets over a connecting line, assuming to secure accommodations thereon, it is liable for the failure of such connecting

line to furnish proper accommodations, notwithstanding that by notice printed on its tickets it claims to act only as agent and not to be liable beyond its own line.—*Bussman v. Western Transit Co.*, 9 Misc. (N. Y.) 410, 29 N. Y. Supp. 1066.

A street railway company was a lessee of running rights over the tracks of a traction company, under the agreement paying the latter two and a half cents for every passenger it carried over the latter's lines.—*Held*, that this did not create a joint obligation of both companies for the safe carriage of the street railway company's passengers, the division of fares being only a method of estimating the rental to be paid by the lessee, the traction company remaining in the sole ownership and control of the road.—*Beckman v. Meadville & C. S. St. R. Co.*, — Pa. —, 67 Atl. 983.

[32] Actions for penalties.

Penalties and forfeitures for failure to furnish facilities for interchange of traffic between connecting lines,—see post, § 56.

Refusal to accept goods from a connecting carrier may be an unjust discrimination, making the road so refusing liable to penalties.—*Houston & T. C. R. Co. v. Lone Star Salt Co.*, 19 Tex. Civ. App. 676, 48 S. W. 619.

The failure of connecting carriers to have the state commission prescribe the division of rates, etc., between them, is no defense in a suit by a shipper.—*Houston & T. C. R. Co. v. Lone Star Salt Co.*, 19 Tex. Civ. App. 676, 48 S. W. 619.

[33] Effect of traffic agreement on necessity for consents of abutting owners.

A traffic agreement was entered into between three street railroad companies by virtue of which one was permitted to operate over the tracks of the other two and the curve connecting such tracks.—*Held*, that the consents of property owners and local authorities need not be obtained before the said company could so operate.—*Kunz v. Brooklyn Heights R. Co.*, 25 Misc. (N. Y.) 334, 54 N. Y. Supp. 187.

[34] Control over crossings and intersections.

L. 1890, ch. 565, § 35, confers on the Board of Railroad Commissioners a limited power to determine the terms on which one railroad shall cross and intersect with another.—*New York, L. & W. R. Co. v. Erie R. Co.*, 31 App. Div. (N. Y.) 378, 52 N. Y. Supp. 318.

[35] What constitutes a union or intersection.

A connection between a street surface railway and an elevated railroad by an inclined plane is not a joining or union within the meaning

of N. Y. R. R. L., § 4.—*Eldert v. L. I. Elect. Co.*, 28 App. Div. (N. Y.) 451, 51 N. Y. Supp. 186; *affd.* without opinion, 165 N. Y. 651, 59 N. E. 1122.

If two railroads cross each other, they intersect, even though not at grade, and are subject to the same regulation as though they crossed at grade.—*International & G. N. R. Co. v. R. R. Commission*, 14 Tex. Ct. R. 42, 89 S. W. 961.

A Texas act provided that every railroad shall furnish sufficient accommodations for the transportation of all such property as shall be offered for transportation at the place of starting and at junctions with other roads, failure to do which shall subject it to the regulations of the Railroad Commission.—*Held*, this conferred on the Commission authority to compel two roads crossing not at grade to connect their tracks.—*International & G. N. R. Co. v. R. R. Commission*, 14 Tex. Ct. R. 42, 89 S. W. 961.

[36] Whether actual crossing necessary.

N. Y. R. R. L., § 4, subd. 5, giving any railroad the right to “cross, intersect, join or unite its railroad” with any other railroad before constructed, at any point on its route, is not limited to those roads whose lines as laid out shall actually cross the other roads, but if the two lines come so near together that it becomes desirable that one shall join or make connections with the other, authority is given to do so.—*Jennings v. D. L. & W. R. Co.*, 103 App. Div. (N. Y.) 164, 93 N. Y. Supp. 374.

The provisions of statute as to intersecting and connecting roads are not exclusively applicable to cases where the routes of two independent roads, as mapped and laid out, cross and intersect each other, but they were designed to embrace cases where the public interests require an interchange of freight and passengers between roads whose lines are continuous, or so near each other in villages and cities that the public interests require that the roads should grant facilities for the interchange of cars, freight and passengers—*New York, L. & W. R. Co. v. Erie R. Co.*, 31 App. Div. (N. Y.) 378, 52 N. Y. Supp. 318.

[37] Who must show need of connections at points of intersection.

On an appeal from an order of a state commission to build a connecting switch at a point of intersection, the burden is on the railroad to show that such a connection is not needed.—*Jacobson v. Wisconsin, M. & P. R. Co.*, 71 Minn. 514, 74 N. W. 893.

[38] Intersections of steam and electric railroads.

N. Y. R. R. L., § 12, requiring railroads to form connections at points where their lines are intersected by any new railroad, applies to

intersections of steam railroads by electric street railroads.—*Matter of Stillwater & M. St. R. Co.*, 171 N. Y. 589, 64 N. E. 511, 59 L. R. A. 479, revg. s. c. 72 App Div. (N. Y.) 294, 76 N. Y. Supp. 68; *Buffalo, B. & L. R. Co. v. N. Y. L. E. & W. R. Co.*, 72 Hun (N. Y.), 583, 25 N. Y. Supp. 265.

An electric railway intersecting with a steam railway may compel the latter to receive and deliver cars and freight and the differences in the cars, rate of speed, etc., on the former does not justify the latter in refusing.—*Hudson Valley R. Co. v. Boston & M. R. Co.*, 45 Misc. (N. Y.) 520, 92 N. Y. Supp. 928; *affd.* 106 App. Div. (N. Y.) 375, 94 N. Y. Supp. 545.

The N. Y. Board of Railroad Commissioners has power to determine what proportion of the expense of a proposed crossing of a railroad and street railroad shall be borne by the street railroad.—*Delaware, L. & W. R. Co. v. Syracuse, L. & B. R. Co.*, 28 Misc. (N. Y.) 456, 59 N. Y. Supp. 1035; *affd.* 43 App. Div. (N. Y.) 621, 60 N. Y. Supp. 386.

N. Y. R. R. L., § 12, relating to the crossing of one railroad by another, is applicable to the intersection of an electric trolley line and a steam railroad.—*Port Richmond R. Co. v. Staten I. R. Co.*, 71 Hun (N. Y.), 179, 24 N. Y. Supp. 566; *affd.* 144 N. Y. 445, 39 N. E. 392.

Where, in a case arising under N. Y. R. R. L., § 68, an electric railway company operating on a highway, makes application to the N. Y. Public Service Commission for authority to cross the tracks of a steam railroad at grade, and it appears that the traffic on the highway and on the two lines in question is sufficient to make the proposed crossing dangerous and that the danger is likely to increase in the future, the Commission should refuse to permit such a crossing until the petitioning company can show conclusively that full consideration has been given to other methods of crossing, and can show that no other practicable method exists.—*Petition of the International R. Co.* Decided by the N. Y. Public Service Commission of the Second District, Dec. 20, 1907.

§ 36. Long and short haul; * [power of commission to authorize less charge for longer than for shorter distance].—No common carrier, subject to the provisions of this act, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or of a like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer

* Words in brackets are not a part of section heading as enacted.—Ed.

distance; but this shall not be construed as authorizing any such common carrier to charge and receive as great a compensation for a shorter as for a longer distance or haul. Upon application of a common carrier the commission may by order authorize it to charge less for longer than for shorter distances for the transportation of passengers or property in special cases after investigation by the commission, but the order must specify and prescribe the extent to which the common carrier making such application is relieved from the operation of this section, and only to the extent so specified and prescribed shall any common carrier be relieved from the operation and requirements of this section.

For practically identical provisions of Interstate Commerce Act,—see Interest. Com. Act, § 4, post, Appendix B.

Rates shall be reasonable in themselves,—see ante, § 26.

Discriminations in rates, in general,—see ante, § 31.

Undue preferences, in general,—see ante, § 32.

Power of the Commission to correct rates which violate the long and short haul rule,—see post, § 49.

Penalties and forfeitures for making a lesser charge for longer than for shorter distances,—see post, § 56.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Purpose of regulative acts,—see ante, § 1, note [32].

Who are common carriers,—see ante, § 2, notes [2]–[7].

What constitutes a railroad or street railroad,—see ante, § 2, note [8].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Power of Commission to determine as to rates,—see post, § 49, notes [6]–[12].

[1] Purpose of long and short haul section.

The long and short haul section of the Interstate Commerce Act was intended to break up the basing-point, or distributing-point, system of rate-making.—*Raworth v. No. Pac. R. Co.*, 2 Interst. Com. R. 614, 3 Interst. Com. R. 857, 5 I. C. C. R. 234.

Natural commercial advantages resulting from location were intended to be maintained and promoted, not destroyed or neutralized, by the long and short haul rule of the Interstate Commerce Act.—*Raworth v. No. Pac. R. Co.*, 2 Interst. Com. R. 614, 3 Interst. Com. R. 857, 5 I. C. C. R. 234.

[2] Scope and application of section.

The long and short haul clause applies to a through route over connecting lines.—*Cincinnati, N. O. & T. P. R. Co. v. Interst. Com. Commission*, 162 U. S. 184, 16 Sup. Ct. R. (U. S.) 700.

Interst. Com. Act, § 4, is based on distance and relates to the actual transportation charges, and not to demurrage charges, which are in the nature of charges for storage in the cars of the carrier.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

The long and short haul clause does not apply unless the lesser is included within the longer distance.—*Louisville & N. R. Co. v. Walker*, 110 Ky. 961, 23 Ky. L. R. 453, 63 S. W. 20.

[3] What constitutes a "line."

Under Interst. Com. Act, § 4, there is a clear distinction between "railroad" and "line." Two carriers may use the same "road," but each has its separate "line." Joint use of the same trackage by lease or otherwise, does not constitute the same "line."—*Interst. Com. Commission v. C. N. O. & T. P. R. Co.*, 56 Fed. 925.

The word "line" in the long and short haul clause of the Interstate Commerce Act means a physical line, and not a mere business arrangement.—*Daniels v. Ch. R. I. & P. R. Co.*, 6 Inters. Com. R. 458; *Boston & A. R. Co. v. Boston & L. R. Co.*, 1 Inters. Com. R. 291, 400, 500, 1 I. C. C. R. 158

The physical connection of two roads which unite in carrying traffic under joint tariffs, constitutes an extended "line" of which each road forms a part.—*Daniels v. Ch. R. I. & R. P. R. Co.*, 6 Inters. Com. R. 458.

[4] Common-law rule.

Unless prohibited by law, a carrier may charge higher fares to way stations than their proportion of the distance.—*State v. Overton*, 24 N. J. L. 433.

At common law, a carrier might discriminate in favor of longer distances.—*Hersh v. Northern Central R. Co.*, 74 Pa. 182.

[5] Duty of carrier under statutory provisions.

Meaning of term "rate,"—see ante, § 26, note [26].

Duty to charge rates reasonable in themselves,—see ante, § 26, note [29].

A carrier cannot utilize intermediate points as prey on which to nourish its terminals.—*Gustin v. Burl. & M. R. Co.*, 8 Inters. Com. R. 481.

Denying equal through rates to intermediate stations and exacting higher rates therefrom, is unlawful.—*Chicago F. P. Cov. Co. v. Ch. & N. W. R. Co.*, 8 Inters. Com. R. 316.

Carrier making low export rates must treat intermediate localities alike as to such rates and not violate the long and short haul rule.—*Board of R. R. Comrs. v. A. T. & S. F. R. Co.*, 8 Inters. Com. R. 304.

In the application of export rates, intermediate territory should not be discriminated against. In no case should the rate from the more distant point to the seaboard be less than that from intermediate points on the same line.—*Export & Domestic Rates*, 8 Inters. Com. R. 214.

Whatever line participates in a low export rate must make a corresponding rate on similar traffic from intermediate points on its line.—*Export & Domestic Rates*, 8 Inters. Com. R. 214.

It is proper for a carrier, within reasonable limits, to accept less per ton per mile upon long hauls than upon short ones, and to widen the disparity between such rates as the difference in distance increases.—*Colorado F. & I. Co. v. So. Pac. Co.*, 6 Inters. Com. R. 488.

Competitive passenger rates cannot be reduced, under Interst. Com. Act, § 4, without reducing intermediate rates.—*In re Passenger Tariffs & Rate Wars*, 2 Inters. Com. R. 340, 2 I. C. C. R. 513.

[6] Prohibited acts also an unjust discrimination.

Unjustified departures from the long and short haul rule constitute undue prejudice to the intermediate locality and shippers and traffic therefrom.—*Violation of Act to Reg. Commerce by St. L. & S. F. R. Co.*, 8 Inters. Com. R. 290.

A greater charge for a shorter than a longer haul is an unreasonable charge and an unlawful discrimination, as well as a violation of the long and short haul rule.—*Phillips Co. v. L. & N. R. Co.*, 8 Inters. Com. R. 93.

The exaction, without lawful excuse of a greater compensation in the aggregate for the shorter than the longer haul over the same line in the same direction, the shorter being included in the longer, forbidden by Inters. Com. Act, § 4, is only a form of unjust discrimination or undue preference, to which Congress desired to call particular attention because of its prevalence in certain sections of the country.—*McClelen v. So. R. Co.*, 6 Inters. Com. R. 588.

The provisions of the Interstate Commerce Act forbidding unjust discriminations, etc., apply even where a departure from the long and short haul rule of the act is justified, if the disparity is so great as to amount to discrimination.—*Raworth v. No. Pac. R. Co.*, 2 Inters. Com. R. 614, 3 Inters. Com. R. 857, 5 I. C. C. R. 234.

[7] Violation a question of fact.

Whether given rates violate provisions of the Interstate Commerce Act is a question of fact.—*Export & Domestic Rates*, 8 Inters. Com. R. 214.

[8] No definite rule.

It is impossible to apply any definite rule to the solution of any question arising under Interst. Com. Act, § 4.—*Danville v. So. R. Co.*, 8 Inters. Com. R. 409.

[9] Validity of statutes.

The provision of the Constitution of Kentucky that a railroad shall not charge more for a longer than shorter haul, the shorter distance being included within the longer, in so far as it applies to a long haul from a place without to a place within the state, and a shorter haul on the same line between points wholly within the state, is invalid as an interference with interstate commerce.—*Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. R. (U. S.) 277.

The statute of Illinois as to compensation of carriers for long and short hauls construed by the state court to apply to commerce between points within and points without the state in so far as the transportation was within the state, is unconstitutional to the extent to which it applies to such interstate commerce.—*Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. R. 4, revg. s. c. 105 Ill. 236.

An act prohibiting a carrier from charging for transportation for any specific distance a greater sum than it charges for a greater distance, is valid.—*Chicago, B. & Q. R. Co. v. Anderson*, 72 Neb. 856, 101 N. W. 1019.

[10] Relief from long and short haul rule — Constitutionality of provision.

It is constitutional to vest a state railroad commission with power to permit roads to charge less for a longer than for a shorter distance.—*Louisville & N. R. Co. v. Commonwealth*, 106 Ky. 633, 21 Ky. L. R. 232, 51 S. W. 164, 1012.

[11] — Extent of power of commission.

There seems to be no limitation on the power of the Interstate Commerce Commission to grant relief from the long and short haul rule, when, after investigation, the Commission is satisfied that the interests of commerce and common fairness to the railroads advise that such permission be granted.—*Railroad Commission of Ga. v. Clyde Ss. Co.*, 4 Inters. Com. R. 120, 5 I. C. C. R. 326.

[12] — When relief will be granted.

The Interstate Commerce Commission will not relieve a carrier from the long and short haul section except upon a verified petition and after investigation into the facts.—*In re Southern Pac. R. Co.*, 1 Inters. Com. R. 16, 1 I. C. C. R. 6.

The Interstate Commerce Commission will not grant, *ex parte* and in advance, relief from the long and short haul section, but will require the carrier to take the initiative and fix the rates, and then will decide on their justice when complaint is made.—*In re Louisville & N. R. Co.*, 1 Inters. Com. R. 16, 278, 1 I. C. C. R. 31.

[13] — Matters which may be considered.

Standards of comparison.—see post, note [22].

Matters justifying departure from long and short haul rule.—see post, notes [24]–[35].

On an application by a carrier for relief from the long and short haul rule, he may present every material reason for an order granting the permission.—*Railroad Commission of Ga. v. Clyde Ss. Co.*, 4 Inters. Com. R. 120, 5 I. C. C. R. 326.

[14] — Whether application for relief must be made in advance of charging rates.

Where a violation of the long and short haul section of the Interstate Commerce Act is complained of, competition which is controlling on traffic and rates produces of itself the dissimilarity of circumstances and conditions, and the carrier has a right of his own motion to take it into account in fixing rates to the competitive point. Relief from the section arises from the law and not the discretion of the Commission.—*East Tenn. V. & G. R. Co. v. Interst. Com. Commission*, 181 U. S. 11, 21 Sup. Ct. R. (U. S.) 516, revg. s. c. 99 Fed. 53.

The provision of the Interstate Commerce Act, § 4, authorizing a carrier to apply to the Interstate Commerce Commission for leave to charge a less rate for a longer than a shorter haul, does not make it unlawful *per se* for the carrier to charge such less rate without first applying to the Commission. It may put the rate in force and when challenged in the courts or before the Commission, may show the justifying circumstances.—*Detroit, G. H. & M. R. Co. v. Interst. Com. Commission*, 74 Fed. 803, revg. s. c. 57 Fed. 1005; *affd.* 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986.

It is not necessary for a carrier to apply to the Interstate Commerce Commission for relief from Interst. Com. Act, § 4, when the circumstances and conditions are substantially dissimilar, since the carrier, in acting upon them, would commit no breach of the law, though it would be responsible in case it were found that the circumstances and

conditions were misconceived or misjudged.—*Interst. Com. Commission v. C. N. O. & T. P. R. Co.*, 56 Fed. 925.

To authorize a greater charge for a shorter than a longer haul, under *Interst. Com. Act*, § 4, it is not necessary that the carrier should first obtain permission from the Commission. It is enough if the "circumstances and conditions" are not in fact "substantially similar." The carrier may determine this at his own risk, subject to liability for violating the Act, if the Commission and the court do not, upon inquiry, sustain his view.—*Interst. Com. Commission v. A. T. & S. F. R. Co.*, 50 Fed. 295; appeal dismissed, 81 Fed. 1005, 149 U. S. 264, 13 Sup. Ct. R. (U. S.) 837.

[15] — Facts of each case to control.

Upon applications by carriers to be relieved from the application of the long and short haul clause, the Interstate Commerce Commission must determine each case upon its own facts and special circumstances.—*Petition of Cincinnati, H. & D. R. Co.*, 6 Inters. Com. R. 323.

[16] — Facts justifying relief by commission.

The Interstate Commerce Commission may grant relief from the long and short haul rule to enable a carrier to meet, at competitive points, the rates and facilities offered by a carrier not under the Commission's jurisdiction.—*Matter of Application of A., T. & S. F. R. Co.*, 7 Inters. Com. R. 593.

[17] — Effect of exoneration.

Permission or exoneration by a state commission, under the long and short haul section of the Kentucky statute, can have no retroactive effect.—*Louisville & N. R. Co. v. Van Cleave*, 110 Ky. 968, 23 Ky. L. R. 479, 63 S. W. 22.

[18] — Review of action of commission.

Under the statute of Kentucky, authorizing the railroad commission to permit, in special cases, the charging of less for a long than a short haul and to prescribe the extent to which the carrier may be relieved from the provisions of the long and short haul section, the courts cannot revise an order of the commission refusing an application by a carrier to be allowed to charge less for a long than for a short haul.—*Louisville & N. R. Co. v. Commonwealth*, 104 Ky. 226, 20 Ky. L. R. 1380, 47 S. W. 598, 43 L. R. A. 541.

[19] Proceedings before commission where violation is alleged.

If the pleadings show a departure from the long and short haul rule, an order will be issued against such violation of the Interstate Com-

merce Act, unless the carrier affirmatively justifies the rates complained of.—*Violation of Act to Reg. Commerce by St. L. & S. F. R. Co.*, 8 Inters. Com. R. 290.

Where the Interstate Commerce Commission finds that a carrier has been charging rates which violate the long and short haul rule, it may make an order requiring the carrier to desist from such charges and then suspend the order to enable the carrier to apply for relief under the proviso clause of Interst. Com. Act, § 4.—*Board of Trade of Chattanooga v. E. Tenn. V. & G. R. Co.*, 2 Inters. Com. R. 798, 3 Inters. Com. R. 106, 213, 5 I. C. C. R. 546.

Where a violation of the long and short haul is alleged, and the carrier pleads justification, it must in its answer set forth clearly and in detail the facts and circumstances relied on by it as constituting justification.—*Raworth v. No. Pac. R. Co.*, 2 Inters. Com. R. 614, 3 Inters. Com. R. 857, 5 I. C. C. R. 234.

When a carrier is called on to justify rate sheets, which make a greater charge for a lesser than a longer distance, notice of such hearing should be published, so that the public and competing carriers may be heard.—*In re Chicago, St. P. & K. C. R. Co.*, 2 Inters. Com. R. 55, 137, 2 I. C. C. R. 231.

[20] Inference arising from disparity between rates.

Where the disparity between long and short distance charges is very great, the inference is irresistible that the lesser rate must be unremunerative on any theory, or else the larger rate gives an unwarranted return for the service rendered.—*Board of Trade of Chattanooga v. E. Tenn. V. & G. R. Co.*, 2 Inters. Com. R. 798, 3 Inters. Com. R. 106, 213, 5 I. C. C. R. 546.

[21] Interests to be considered in determining reasonableness of greater charge.

In deciding whether rates and charges made low in order to secure foreign freight which would otherwise move by other competing routes, are not unjust and discriminative, the fair interests of the carriers, as well as the welfare of the community which is to receive and consume the commodities are to be considered.—*Interst. Com. Commission v. So. R. Co.*, 105 Fed. 703.

[22] Standards of comparison.

A joint through rate is not the basis for determining whether a local rate of a carrier is a violation of the long and short haul clause of Interstate Commerce Act.—*U. S. v. Mellen*, 53 Fed. 229.

Where two carriers establish a through tariff over their connecting lines, the through tariff is not the standard by which the separate tariff

of either company is to be measured in determining whether such separate tariff of either company violates Interst. Com. Act, § 4.—*Chicago & N. W. R. Co. v. Osborne*, 52 Fed. 912, revg. s. c. 48 Fed 49; certiorari denied, 146 U. S. 354, 13 Sup. Ct. R. (U. S.) 281.

To hold that, after substantial dissimilarity of circumstances and conditions has been shown, the longer distance rate cannot in any case or to any extent be considered by way of comparison in determining whether or not the shorter distance rate is unreasonable or unduly prejudicial, particularly when competition and other compulsory conditions are found not to justify the whole disparity between the shorter and longer distance rates, would be to reject a most appropriate and necessary test of the reasonableness and justice of railway charges.—*Marten v. L. & N. R. Co.*, 9 Inters. Com. R. 581.

When water competition permits the establishment of classifications and rates below the rates fixed to non-competitive points, such rates, while possessing value as standards of comparison, are not always conclusive in fixing rates to intermediate points.—*Shippers' Union v. A. T. & S. F. R. Co.*, 9 Inters. Com. R. 250.

[23] Burden of justifying charge.

Where a greater rate is charged for a shorter than for a longer concurrent haul, the burden of showing the dissimilar circumstances and conditions to justify such charge, is on the carrier.—*Behlmer v. L. & N. R. Co.*, 83 Fed. 898, revg. s. c. 71 Fed. 835; revd. on other grounds, 175 U. S. 648, 20 Sup. Ct. R. (U. S.) 209.

The carrier must affirmatively and clearly justify its departure from the long and short haul rule.—*Phillips Co. v. L. & N. R. Co.*, 8 Inters. Com. R. 93.

Where substantial dissimilarity of conditions and circumstances is set up by carriers in justification of departures from the long and short haul clause of the Interstate Commerce Act, the burden is upon them to establish such dissimilarity.—*Board of Trade v. Ala. Mid. R. Co.*, 6 Inters. Com. R. 1.

Where a carrier alleged to have violated the long and short haul rule of the Interstate Commerce Act, pleads justification in answering the complaint, it is bound by its pleading and must affirmatively show that the conditions and circumstances are in fact substantially dissimilar.—*Railroad Commission of Ga. v. Clyde Ss. Co.*, 4 Inters. Com. R. 120, 5 I. C. C. R. 326.

The burden of proof of justifying a greater charge for a lesser than a longer distance is on the carrier.—*Spartanburg Bd. of Trade v. Richmond & D. R. Co.*, 2 Inters. Com. R. 15, 193, 2 I. C. C. R. 304.

[24] Dissimilar circumstances and conditions as justification — In general.

Whether the circumstances and conditions of carriage have been substantially similar or otherwise, are questions of fact depending on the matters proved in each case.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45, affg. s. c. 74 Fed. 715, 69 Fed. 227; *Missouri Pac. R. Co. v. Tex. & P. R. Co.*, 31 Fed. 862, 4 Inters. Com. R. 434; *Phillips Co. v. L. & N. R. Co.*, 8 Inters. Com. R. 93.

It cannot be said that under no circumstances and condition would it be lawful for a carrier to charge more for a shorter than a longer distance, but it is for the tribunal appointed to enforce the provisions of the statute to consider whether the existing circumstances and conditions were or were not substantially similar.—*Cincinnati, N. O. & T. P. R. Co. v. Interst. Com. Commission*, 162 U. S. 184, 16 Sup. Ct. R. (U. S.) 700.

Substantially dissimilar circumstances and conditions justify a violation of Interst. Com. Act, § 4, relative to rates for long and short hauls.—*Interst. Com. Commission v. Western & A. R. Co.*, 88 Fed. 186; affd. 93 Fed. 83; *Interst. Com. Commission v. Ala. Mid. R. Co.*, 69 Fed. 227; affd. 74 Fed. 715, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45.

It is for the courts to say what are "substantially similar circumstances and conditions" in any given case.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 69 Fed. 227; affd. 74 Fed. 715, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45.

Where there is doubt in interpreting Interst. Com. Act, § 4, whether the conditions are substantially similar, or where it is difficult to point out clearly the circumstance or condition which produces dissimilarity, the doubt should be resolved in favor of the object of the law.—*Missouri Pac. R. Co. v. T. & P. R. Co.*, 31 Fed. 862.

Facts held to justify violation of the long and short haul clause of the Interstate Commerce Act.—*Pratt Lumber Co. v. Ch. I. & L. R. Co.*, 10 Inters. Com. R. 29.

In a case involving shorter distance charges higher than those to or from longer distance points, the carrier cannot rightfully claim justification for greater dissimilarity in rates than may be indicated by ascertained dissimilarity in circumstances and conditions.—*Marten v. L. & N. R. Co.*, 9 Inters. Com. R. 581.

A railroad engaged in through transportation cannot call itself merely a local carrier from the intermediate point, and thereby justify a greater charge for the lesser distance.—*Violations of Act to Reg. Commerce by St. L. & S. F. R. Co.*, 8 Inters. Com. R. 290.

Open or secret rebating or rate-cutting do not create dissimilarity of conditions, under long and short haul section.—*In re Atchison, T. & S. F. R. Co.*, 7 Inters. Com. R. 61.

The rule expressed by Interst. Com. Act, § 4, is not rendered inoperative by the existence at one point of converging lines subject to the Act, for the law applies to each of those lines, and neither can put in rates to that point which are lower than shorter distance charges on its lines until it has obtained permission from the regulating authorities so to do. The principle applies both to lines between the same points and to lines reaching the same destination from different points of consignment.—*Gerke Brew. Co. v. L. & N. R. Co.*, 3 Inters. Com. R. 681, 4 Inters. Com. R. 461, 5 I. C. C. R. 596.

That the short haul is of way traffic and the long haul is not, does not justify a greater charge for the lesser distance.—*In re Louisville & N. R. Co.*, 1 Inters. Com. R. 16, 278, 1 I. C. C. R. 31.

[25] — Difference in bulk or value.

A difference in the bulk and value of lumber does not justify a greater charge for a shorter than a longer haul, when the published rate sheet of the carrier puts the lumber in the same class and at the same rate.—*James v. E. Tenn. V. & G. R. Co.*, 2 Inters. Com. R. 436, 490, 609, 3 I. C. C. R. 225.

[26] — Cost and expense of carrying.

Differences in the cost of delivery of the freight to the carrier for transportation do not justify departures from the long and short haul rule of the Interstate Commerce Act.—*Chicago F. P. Cov. Co. v. Ch. & N. W. R. Co.*, 8 Inters. Com. R. 316.

Terminal charges and similar expenses not dependent on the distance freight is carried, sometimes justify a greater proportionate charge for a lesser distance.—*Coxe Bros. v. Lehigh V. R. Co.*, 2 Inters. Com. R. 195, 229, 3 Inters. Com. R. 460, 4 I. C. C. R. 535.

That the shorter haul is the more expensive does not justify a greater charge for the lesser distance, unless such difference is extraordinary.—*In re Louisville & N. R. Co.*, 1 Inters. Com. R. 16, 278, 1 I. C. C. R. 31.

Under the long and short haul statute of Kentucky, difference in cost of service, was held to alone constitute the difference of circumstances and conditions which will authorize greater aggregate compensation for the shorter than for the longer distance on the same line.—*Louisville & N. R. Co. v. Commonwealth*, 104 Ky. 226, 20 Ky. L. R. 1380, 46 S. W. 707, 47 S. W. 210, 598, 43 L. R. A. 541.

[27] — Financial necessity.

A road which pays 12 per cent. annually to its stockholders is not in a position to maintain that rates from a market city to a competitive point on that road, agreed to by rival carriers and long enforced, are not suffi-

cient compensation for carrying from the same market to a much less distant point on the same line.—*Calloway v. L. & N. R. Co.*, 7 Inters. Com. R. 431.

That only by departing from the long and short haul rule can a carrier get the traffic and earn a return on its investment, does not justify such departure.—*Brewer v. L. & N. R. Co.*, 7 Inters. Com. R. 224.

[28] — Export rates.

An export rate is not made under similar circumstances and conditions with a domestic rate.—*Kemble v. Boston & A. R. Co.*, 8 Inters. Com. R. 110.

[29] — Length of line.

The great length of a carrier's line does not justify it in departing from the long and short haul rule.—*Tileston Mill. Co. v. No. Pac. R. Co.*, 8 Inters. Com. R. 346.

[30] — Fostering of traffic.

That the smaller charge for the longer haul is of great importance to the longer distance point, in enabling its merchants to build up a great trade that would otherwise be lost, does not justify such discrimination.—*Behlmer v. L. & N. R. Co.*, 83 Fed. 898, revg. s. c. 71 Fed. 835; revd. on other grounds, 175 U. S. 648, 20 Sup. Ct. R. (U. S.) 209.

A carrier may make a low rate to create traffic.—*Grain Shippers' Assn. v. Ill. Cent. R. Co.*, 8 Inters. Com. R. 158.

The fact that one city is a larger city with more extensive business interests than another and has been treated by the railroads as a "trade center" or "basing point" in making rates to the latter city and other nearby towns, is no justification for discriminations in rates in favor of the former city.—*Board of Trade v. Ala. Mid. R. Co.*, 6 Inters. Com. R. 1.

That the rates to the remoter point cannot be raised without losing the traffic, and that neither the rate to the remoter nor to the nearer point are shown to be unreasonable in themselves, do not justify a disparity in rates amounting to discrimination against the nearer point.—*Raworth v. No. Pac. R. Co.*, 2 Inters. Com. R. 614, 3 Inters. Com. R. 857, 5 I. C. C. R. 234

That the lesser charge on the longer haul is merely a continuation of the favorable rates under which trade centers or industrial establishments have been built up, does not justify such charge.—*In re Louisville & N. R. Co.*, 1 Inters. Com. R. 16, 278, 1 I. C. C. R. 31.

That the lesser charge on the longer haul is designed to build up business or trade centers, does not justify such charge.—*In re Louisville & N. R. Co.*, 1 Inters. Com. R. 16, 278, 1 I. C. C. R. 31.

That the lesser charge on the longer haul is to encourage manufactures, etc., does not justify a greater charge for the lesser distance.—*In re Louisville & N. R. Co.*, 1 Inters. Com. R. 16, 278, 1 I. C. C. R. 31.

[31] — Competition as justification.

The giving of a lower rate from New Orleans to Atlanta, a competitive point, than to non-competitive points along the same line and at a less distance from New Orleans is not necessarily a violation of Interst. Com. Act, § 4, relative to rates for long and short hauls, and it is not material that competition might be established at the non-competitive point.—*Interst. Com. Commission v. L. & N. R. Co.*, 190 U. S. 273, 23 Sup. Ct. R (U. S.) 687.

Where a violation of the long and short haul section of the Interstate Commerce Act is complained of, competition which is controlling on traffic and rates produces of itself a dissimilarity of circumstances and conditions, and the carrier has a right of his own motion to take it into account in fixing rates to the competitive point.—*East Tenn. V. & G. R. Co. v. Interst. Com. Commission*, 181 U. S. 1, 21 Sup. Ct. R. (U. S.) 516, revg. s. c. 99 Fed. 52.

Competition, even between carriers subject to the same act, creates dissimilar circumstances.—*Interst. Com. Commission v. Clyde Ss. Co.*, 181 U. S. 29, 21 Sup. Ct. R. (U. S.) 512.

Competition is one of the most obvious and effective conditions which render the circumstances of a long and short haul so substantially dissimilar as to warrant a less charge for the greater distance; and the framers of the Interstate Commerce Act must have intended that it should be so considered.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45, affg. s. c. 74 Fed. 715, 69 Fed. 227.

Competition between rival routes is a factor to be considered in applying the long and short haul section of the Interstate Commerce Act. The mere fact of competition, no matter what its character and extent, does not necessarily relieve the carrier from the operation of the section, but competition is to be considered in determining what are "substantially similar circumstances and conditions."—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45, affg. s. c. 74 Fed. 715, 69 Fed. 227.

The court was asked to enforce an order of the Interstate Commerce Commission commanding the defendants to cease charging more for goods carried from Atlantic ports to Piedmont, Ala., than was charged from the same points to Anniston, Ala., a shorter distance. The evidence, according to the Commission, showed that the rates to Piedmont were unreasonable and unjust as compared with the rates to Anniston,

in that they gave to the latter city an undue preference and advantage, and subjected the former to an undue prejudice and disadvantage, in territory in which they meet in active competition. The Commission found the rates to Piedmont not excessive or unreasonable in themselves. It also excluded evidence offered by the defendant carriers of competition tending to justify such disparity in rates, the exclusion being on the ground that competition between carriers equally subject to the Interstate Commerce Act is immaterial.—*Held*, that the evidence should have been considered, for if the competition was actual and effectual, it was a justification of the disparity in rates, because the “conditions and circumstances” thereby became “substantially dissimilar.”—*Interst. Com. Commission v. So. R. Co.*, 105 Fed. 703.

Competition is a circumstance which may make the conditions under which a long and short haul is performed substantially dissimilar.—*Interst. Com. Commission v. So. R. Co.*, 105 Fed. 703; *Interst. Com. Commission v. Western R. Co.*, 93 Fed. 83, affg. s. c. 88 Fed. 186.

The duty to take competition into consideration in construing Interst. Com. Act, § 4, is not affected by the fact that the competition is between carriers subject to that Act.—*Interst. Com. Commission v. So. R. Co.*, 105 Fed. 703.

The charging of a greater rate for a shorter than for a longer haul is not unlawful under Interst. Com. Act, § 4, when the rate for the shorter distance is not itself excessive, and the more distant point is a large traffic center, where both water and rail competition is keen; as such facts constitute a dissimilarity of circumstances and conditions within the meaning of the Act.—*Brewer v. Central of Ga. R. Co.*, 84 Fed. 258.

To justify a greater charge for a shorter distance because of water competition, the transportation as to which such competition exists must be of freight consigned to the longer distance point, which if not carried by the road complained of, would reach that point by water transportation.—*Behlmer v. L. & N. R. Co.*, 83 Fed. 898, revg. s. c. 71 Fed. 835; revd. on other grounds, 175 U. S. 648, 20 Sup. Ct. R. (U. S.) 209.

The public at large is greatly interested in competition and the favorable effect it has on prices, and for that reason the public seeks to keep open the larger markets of the country to all points of production and supply. Where traffic from a distance can compete with traffic nearer the market, the public is interested in having the greater distance traffic carried at rates which will enable it to compete with the traffic which is nearer the market. The Interstate Commerce Act will be interpreted, in a broad and practical way, to facilitate such competition. Rigidly theoretical rules and purely mathematical calculations cannot be permitted to govern.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

Competition of market with market, as well as carrier with carrier, may be considered, in fixing rates.—*Interst. Com. Commission v. C. N. O. & T. P. R. Co.*, 56 Fed. 925.

Competition and “dissimilarity of circumstances” under *Interst. Com. Act*, § 4, discussed and analyzed.—*Interst. Com. Commission v. C. N. O. & T. P. R. Co.*, 56 Fed. 925.

Competition between rival routes excuses a less charge for a longer haul.—*Interst. Com. Commission v. A. T. & S. F. R. Co.*, 50 Fed. 295; appeal dismissed, 81 Fed. 1005, 149 U. S. 264, 13 Sup. Ct. R. (U. S.) 837.

Under a long and short haul section of a state law, the receiver appointed by a federal court was instructed “to charge no more for the transportation of goods than the maximum allowed by the Act, nor no more for a short haul than a long one in the same direction, except to and from points where the rate obtainable is affected by water transportation, in which case he may carry at as low a rate as the water-craft do, without reference to the length of the haul.”—*Ex parte Koehler*, 23 Fed. 529.

Notwithstanding the fact that the Oregon statute recognizes no exception to its long and short haul rule, a railway corporation may charge less for a long haul than a short one in the same direction, where the rate for the long haul is caused by other lines of transportation competing for business at the point whence the long haul is made; and where the road of such corporation forms a part of a line of transportation consisting largely of water carriage between two principal points, the rate may be made so as to enable it to compete with another road that constitutes a part of another line of railway and water transportation between the same points.—*Ex parte Koehler*, 25 Fed. 73.

Where actual competition exists at the more distant point, which does not obtain at the intermediate or nearer point, and where such competition has actually produced at the more distant point the low rate which the carrier cannot control and must meet to obtain a share of the business, *Interst. Com. Act*, §§ 3, 6, do not prohibit the disparity in rates, so long as the low competitive rate is reasonable in itself.—*Mayor of Wichita v. A. T. & S. F. R. Co.*, 9 Inters. Com. R. 534.

Since water competition affects all-rail rates from New York to the Pacific coast, an order requiring as low or lower rates from St. Louis to the coast as from New York, is not necessarily demanded by a showing that the distance is less and that duly graded rates were at one time in force.—*Business Men's League v. A. T. & S. F. R. Co.*, 9 Inters. Com. R. 318.

Neither the absence nor presence of competition by carriers alone, nor the extent of its operation measured solely by their financial interests,

can be relied on to adjust rates. There may be effectual means foreign to local traffic conditions for curbing competition at one point and not at another.—*Mayor of Tifton v. L. & N. R. Co.*, 9 Inters. Com. R. 160.

The mere fact of competition at the longer distance point does not necessarily justify the lower charge for the longer distance.—*Holdzkom v. Mich. Cent. R. Co.*, 9 Inters. Com. R. 42.

Mere proof of the conditions of competition which led to a departure from the long and short haul rule, is not justification.—*Danville v. So. R. Co.*, 8 Inters. Com. R. 409.

Even where it is shown that railway competition creates dissimilarity in conditions, the question remains whether the dissimilarity justifies so great a departure from the long and short haul rule.—*Gustin v. Burl. & M. R. Co.*, 8 Inters. Com. R. 81.

Freely engaging in competition at one point while wholly or largely suppressing it at another, cannot justify a carrier in making a greater charge to the latter and nearer point.—*Calloway v. L. & N. R. Co.*, 7 Inters. Com. R. 431.

The doctrine that competition between carriers may create dissimilarity of circumstances and conditions under Interst. Com. Act. § 4, cannot apply where such competition exists at both the longer and shorter distance points.—*Brewer v. L. & N. R. Co.*, 7 Inters. Com. R. 224.

In a suit for violation of the long and short haul clause of the Kentucky Constitution, it is immaterial whether competition existed at the point to which the longer haul was made.—*Hutchison v. Louisville & N. R. Co.*, 108 Ky 615, 22 Ky L. R. 361, 57 S. W. 251; rehearing denied, 22 Ky. L. R. 1871, 63 S. W. 33.

[32] — What competition is a justification.

The mere fact of railway competition does not necessarily relieve carriers from the restraints of Interst. Com. Act, §§ 3, 4, but only such competition as having due regard to the interests of the public, ought justly to have effect upon rates.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45, affg. s. c. 74 Fed. 715, 69 Fed. 227; *Phillips Co. v. L. & N. R. Co.*, 8 Inters. Com. 93.

All competition is to be taken into consideration, if it possesses the attribute of producing a substantial and material effect on traffic and rate-making, and it is reversible error for the Interstate Commerce Commission to decline to consider it.—*Interst. Com. Commission v. So. R. Co.*, 105 Fed. 703.

To make water competition a justification for a departure from the long and short haul rule, it must be actual and must dictate the rate.

The mere existence of a water way which might afford an avenue for such transportation is not enough.—*Brewer v. L. & N. R. Co.*, 7 Inters. Com. R. 224.

A substantial dissimilarity of circumstances and conditions at two points, through rail competition at one of the same is not established by mere proof that at one of the points there are a number of railway lines running to and through that city connecting with different parts of the country.—*Board of Trade v. Ala. Mid. R. Co.*, 6 Inters. Com. R. 1.

Where water competition is alleged to justify disparities in rates, the carrier must affirmatively show by proof which has more than the effect of presumption and which clearly establishes the fact, that such competition is a controlling factor in the transportation of traffic, important in amount, from the point in question.—*James v. Canadian Pac. R. Co.*, 4 Inters. Com. R. 45, 110, 274, 5 I. C. C. R. 612.

One transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone if the former did not engage in it.—*Board of Trade of Chattanooga v. E. Tenn. V. & G. R. Co.*, 2 Inters. Com. R. 798, 3 Inters. Com. R. 106, 213, 5 I. C. C. R. 546.

Rail competition over the Canadian Pacific and water competition around Cape Horn do not justify violations of the long and short haul rule in transportation from San Francisco to St. Paul, via Fargo, N. Dak.—*Raworth v. No. Pac. R. Co.*, 2 Inters. Com. R. 614, 3 Inters. Com. R. 857, 5 I. C. C. R. 234.

Water competition must be actual, to justify a railroad in making a greater charge for a shorter distance.—*San Bernardino Bd. of Trade v. A. T. & S. F. R. Co.*, 2 Inters. Com. R. 522, 3 Inters. Com. R. 138, 4 I. C. C. R. 104.

A mere situation on a navigable stream is not actual water competition, justifying a lesser charge to such point.—*Harwell v. Columbus & W. R. Co.*, 1 Inters. Com. R. 494, 631, 1 I. C. C. R. 236.

Potential water competition does not justify a greater charge for a lesser than a longer distance.—*Boston & A. R. Co. v. Boston & L. R. Co.*, 1 Inters. Com. R. 291, 400, 500, 1 I. C. C. R. 158.

[33] — Facts in rebuttal.

Where it is claimed that a low rate on a particular commodity is justified by water competition, it may be shown in rebuttal that this commodity is never in fact transported by water between the points in question.—*Holdzkom v. Mich. Cent. R. Co.*, 9 Inters. Com. R. 42.

[34] — Whether competition justifies is question of fact.

Whether railway competition should, and does, create dissimilarity of "circumstances and conditions" is a question of fact in each instance.—*Tileston Mill. Co. v. No. Pac. R. Co.*, 8 Inters. Com. R. 346, interpreting and applying *Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45, affg. s. c. 74 Fed. 715, 69 Fed. 227.

[35] — Unreasonable disparity not justified.

Even where water competition justifies a greater charge for a lesser than a greater distance, charges for the shorter distance which are three times as great as for the longer distance show an absurd and unreasonable disparity. The lower rate must be very unremunerative, or the higher rate grossly extortionate. Particularly where it appears that the disparities operate greatly to the advantage of tank shippers of oil as compared with barrel shippers the carriers will be required to revise their rates so as to eliminate the disproportions.—*Rice v. Cincinnati, W. & B. R. Co.*, 3 Inters. Com. R. 841, 5 I. C. C. R. 193.

[36] What facts show violation of section.

A railroad made an equal charge, for transportation through Detroit to Grand Rapids and to Ionia, though the latter was slightly nearer Detroit than the former.—*Held*, that the act of the railroad in carting the goods of shippers from the station at Grand Rapids to their places of abode or business without charge and refusing to do a like service in Ionia was not a violation of Interst. Com. Act, § 4, relating to charges for long and short hauls.—*Interst. Com. Commission v. Detroit, G. H. & M. R. Co.*, 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986, revg. s. c. 57 Fed. 1005, affg. s. c. 74 Fed. 803.

The fact that a shipper under a joint schedule of rates over connecting railroads is charged a smaller rate on through shipments over the entire length of the joint route than to intermediate points does not establish a claim that the latter rates are unjust or unreasonable.—*Allen v. Oregon R. & N. Co.*, 98 Fed. 16.

The fact that the share of a joint rate taken by one company is less than its local rate for a shorter haul does not violate the long and short haul clause, nor does that section apply to a case where the short haul rate is a combination of the local rates of two connecting lines, and the lower long haul rate is a joint rate made by the two lines acting together.—*U. S. v. Mellen*, 53 Fed. 229, following *Chicago & N. W. R. Co. v. Osborne*, 52 Fed. 912, revg. s. c. 48 Fed. 49; certiorari denied, 146 U. S. 354, 13 Sup. Ct. R. (U. S.) 281.

Where the rate given for the short haul is not in itself unreasonable, and the less rate for the longer haul is justified by competition, there

is no violation of the Interstate Commerce Act.—*Gardner v. So. R. Co.*, 10 Inters. Com. R. 342.

Commutation rates, as compared with other rates, do not violate Interst. Com. Act, § 4, but they must not, as compared with each other, violate that section.—*Sprigg v. B. & O. R. Co.*, 8 Inters. Com. R. 443.

Equal rates for greater and lesser distances on the same line do not violate the long and short haul rule.—*Milk Prod. P. Assn. v. D. L. & W. R. Co.*, 7 Inters. Com. R. 92.

San Francisco sugar shipped to St. Paul had to compete there with sugar refined in New York, and hence the rate on such sugar from San Francisco to St. Paul had to be very low.—*Held*, that this does not justify a higher rate to Fargo than to St. Paul.—*Raworth v. No. Pac. R. Co.*, 2 Inters. Com. R. 614, 3 Inters. Com. R. 857, 5 I. C. C. R. 234.

[37] Actions to recover for violaton of section — Right to recover.

Under the sections of the statutes and constitution of Kentucky, relative to the compensation for long and short hauls, an aggrieved shipper may recover in a civil action the excessive amount paid for transportation.—*Hutcherson & C. v. L. & N. R. R. Co.*, 108 Ky. 615, 22 Ky. L. 361, 57 S. W. 251.

[38] — What must be proved.

In a suit against a carrier for violating the long and short haul section of a state statute, it is not necessary to show that the rates charged were higher than those fixed or approved by the state commission.—*Cohn v. St. L. I. M. & S. R. Co.*, 181 Mo. 30, 79 S. W. 961.

It is not essential to a shipper's recovery for the exaction of a greater charge for a shorter than a longer haul that he should show that contemporaneous shipments were made at the lesser rate for the longer distance, but only that such rates were at that time held out to the public.—*Seawell v. K. C. Ft. S. & M. R. Co.*, 119 Mo. 222, 24 S. W. 1002.

[39] — Admissibility of evidence.

In an action for damages caused by a violation of the long and short haul section of the Interstate Commerce Act, the fact that the rate for the longer distance was established jointly between the defendant and the connecting roads is not a good defense, nor is evidence admissible that in the state to which the longer haul extended competition had forced defendant to cut rates, unless a ground has been laid therefor in the pleadings.—*Junod v. Ch. & N. W. R. Co.*, 47 Fed. 290.

In an action to recover for the exaction of a greater charge for a shorter than a longer haul, plaintiff may prove that before or after the

time his shipment was made, the carrier did transport property for the greater distance at the lesser rates.—*Seawell v. K. C. Ft. S. & M. R. Co.*, 119 Mo. 222, 24 S. W. 1002.

[40] — Defenses.

In an action for damages by breach of the long and short haul section of the Interstate Commerce Act, the fact that the rate for the longer distance was established jointly between the defendant and the connecting roads is not a good defense, and the fact that the freight for the longer haul was billed to a point nearer than the destination of the shorter haul is no bar, when such freight was intended to be, and was actually, taken to the destination of the shorter haul.—*Junod v. Ch. & N. W. R. Co.*, 47 Fed. 290.

[41] — Measure of damages.

In an action to recover for a greater charge for a shorter than a longer haul, the measure of damages is the difference between the two charges.—*Seawell v. K. C. Ft. S. & M. R. Co.*, 119 Mo. 222, 24 S. W. 1002; *Junod v. Ch. & N. W. R. Co.*, 47 Fed. 290.

The jury may add interest to the amount of damages, such interest to be computed from the date of the last shipment.—*Junod v. Ch. & N. W. R. Co.*, 47 Fed. 290.

[42] Criminal prosecutions—Necessity for action by commission.

A finding and recommendation by the state railroad commission is necessary to the finding of an indictment by a grand jury under the long and short haul statute.—*Illinois Cent. R. Co. v. Commonwealth*, 23 Ky. L. R. 1159, 64 S. W. 975.

Under the statutes of Kentucky, a carrier cannot be indicted for a violation of the long and short haul clause of its act regulating carriers in advance of action by the railroad commission.—*Illinois Cent. R. Co. v. Commonwealth*, 23 Ky. L. Rep. 1159, 64 S. W. 975.

A request or finding by the state railroad commission is not necessary to the finding of an indictment by a grand jury, under the long and short haul statute.—*Illinois Cent. R. Co. v. Commonwealth*, 23 Ky. L. R. 544, 63 S. W. 448.

[43] — When agent is liable.

A agent of a railroad cannot be indicted for a violation of Interst. Com. Act, § 4, where it appears that he merely collected and received the rates and had nothing to do with the making thereof.—*U. S. v. Mellen*, 53 Fed. 229.

[44] — Indictments.

An indictment for violation of Interst. Com. Act, § 4, which alleges merely that the charge for a joint through haul is less than a charge for a shorter local haul included within the former, is bad.—*U. S. v. Mellen*, 53 Fed. 229.

An indictment which alleges that a greater rate was charged for transportation from Pittsburg to Lebanon than was charged "from Pittsburg to Louisville and to Elizabethtown," embraces only one offense.—*Louisville & N. R. Co. v. Commonwealth*, 104 Ky. 226, 20 Ky. L. R. 1380, 46 S. W. 707, 43 L. R. A. 541.

An indictment under the long and short haul statute of Kentucky need not state the precise amount received for the longer distance, nor need it designate any particular person or persons other than the complainant, who had been required to pay the greater compensation, but it is sufficient to state in the indictment that the specified amount charged for the shorter distance was greater than that charged or received from persons generally for the longer distance.—*Louisville & N. R. Co. v. Commonwealth*, 104 Ky. 226, 20 Ky. L. R. 1380, 46 S. W. 707, 43 L. R. A. 541.

[45] — Trial under indictment.

On a trial under an indictment for violation of the long and short haul section of the Kentucky law, all testimony offered as to competition and other facts in justification, were properly excluded.—*Louisville & N. R. Co. v. Commonwealth*, 104 Ky. 226, 20 Ky. L. R. 1380, 46 S. W. 707, 43 L. R. A. 541; *Louisville & N. R. Co. v. Commonwealth*, 106 Ky. 633, 21 Ky. L. R. 232, 51 S. W. 164, 1012.

§ 37. Distribution of cars; *[duty of carriers to furnish sufficient and suitable cars; power of commissions to regulate switching, loading, demurrage, etc.].—1. Every railroad corporation or other common carrier engaged in the transportation of freight shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor, and offer freight for transportation, sufficient and suitable cars for the transportation of such freight in car-load lots. Every railroad corporation and street railroad corporation shall have sufficient cars and motive power to meet all requirements for the transportation of passengers and property which may reasonably be anticipated, unless relieved therefrom by order of the commission. In case, at any particular time, a common carrier has not sufficient

* Words in brackets are not a part of section heading as enacted.—Ed.

cars to meet all requirements for the transportation of property in car-load lots, all cars available to it for such purposes shall be distributed among the several applicants therefor, without discrimination between shippers, localities or competitive or non-competitive points, but preference may always be given in the supply of cars for shipment of livestock or perishable property.

2. The commission shall have power to make, and by order shall make, reasonable regulations for the furnishing and distribution of freight cars to shippers, for the switching of the same, for the loading and unloading thereof, for demurrage charges in respect thereto, and for the weighing of cars and freight offered for shipment or transported by any common carrier.

Mandamus to compel furnishing of cars for interstate traffic,—see Interst. Com. Act, § 23, post, Appendix B.

Duty of carriers to furnish safe and adequate facilities, in general,—see ante, § 26.

Duty of carrier to install switch and sidetrack connections,—see ante, § 27.

False reports of weights forbidden,—see ante, § 34.

Liability of carrier for loss or damage by delay in transit,—see post, § 38.

Power of Commission to make reasonable regulations as to service, etc., in general,—see post, § 49.

Power of Commission to compel furnishing of safe and adequate facilities,—see post, §§ 49, 50.

Power of Commission to order repairs or changes in switches or terminal facilities,—see post, § 50.

Power of Commission to order the running of additional cars and trains,—see post, § 51.

General power of the state to regulate property devoted to public,—see ante, § 1, notes [1]–[22].

Purpose of regulative acts,—see ante, § 1, note [32].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

Who are common carriers,—see ante, § 2, notes [2]–[7].

What constitutes a railroad or street railroad,—see ante, § 2, note [15].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

When cars are engaged in interstate commerce,—see ante, § 25, note [8].

Whether statutes requiring the furnishing of cars on application are an attempt to regulate interstate commerce,—see ante, § 25, note [15].

Statutes forbidding preferences in furnishing cars merely declaratory of the common law,—see ante, § 26, note [1].

General duty of carriers not to discriminate as to facilities and service,—see ante, § 32, note [1].

[1] General duty to furnish cars.

Duty to furnish cars for interstate traffic,—see Interst. Com. Act, § 1, post, Appendix B.

Duty of carrier to furnish safe and suitable cars,—see ante, § 26, notes [5]–[7].

Power of Commission to compel furnishing of cars,—see post, § 49, note [13].

The fact that a shipper of coal engages also in some other pursuit and is not a so-called “legitimate operator,” and that he loads the coal directly from wagons instead of from tipples, does not abridge his right to have cars furnished to him for his shipments.—*Thompson v. Pa. R. Co.*, 10 Inters. Com. R. 640.

In granting the privilege of leasing cars and equipment, carriers must treat shippers on an equality.—*Castle v. B. & O. R. Co.*, 8 Inters. Com. R. 333.

It is the duty of the carrier to furnish the vehicle of transportation.—*Independent Ref. Assn. v. W. N. Y. & P. R. Co.*, 4 Inters. Com. R. 167, 5 I. C. C. R. 415.

A railroad is bound, at common law, to furnish suitable and sufficient cars on reasonable notice, when it can do so with reasonable diligence without jeopardizing its other business.—*Di Giorgio I. & S. Co. v. Pa. R. Co.*, 104 Md. 693, 65 Atl. 425.

A railroad is not bound to hold a large number of cars a whole week for one shipper, without knowing what hour or day any of them may be needed.—*Di Giorgio I. & S. Co. v. Pa. R. Co.*, 104 Md. 693, 65 Atl. 425.

A carrier is liable for failure to furnish cars for carrying cattle, after reasonable notice.—*Baltimore & O. R. Co. v. Whitehill*, 104 Md. 295, 64 Atl. 1033.

A railroad company is bound at common law, independently of any statute, to use at least ordinary diligence in procuring a sufficiency of cars to carry all freight tendered it.—*Branch v. Wilmington & W. R. Co.*, 77 N. C. 347.

[2] Duty to furnish special cars or equipment.

See also, ante, § 26, notes [5]–[7].

Power of Commission to compel furnishing of special cars or equipment,—see post, § 49, note [19].

How carrier may procure equipment,—see ante, § 26, note [6].

Power of Commission to compel furnishing of special kinds of cars or equipment,—see post, note [31].

If a carrier holds itself out to carry perishable goods, it must provide a car with equipment for refrigeration, etc. Whether it does so by purchase or by lease does not affect its responsibility to the shipper for the sufficiency of the car and refrigeration.—*Matter of Charges for Transportation of Fruit*, 11 Inters. Com. R. 129.

It is a railroad's duty to furnish milk cars with icing facilities, etc., if the amount of milk carried is large and such facilities would be of public advantage.—*Baker v. Boston & M. R. Co.*, — N. H. —, 65 Atl. 386.

Plaintiff asked for refrigerator cars for melons. The carrier had a contract with a car line company to furnish cars for shipments of this sort. Suitable cars were not furnished, and the shipper sent his melons by express and sued for the excess cost. He was permitted to recover on the ground that if the railroad holds itself out as a carrier of melons, it must furnish the necessary refrigerator cars, etc., and the failure of the car-line company to keep its contract does not excuse it.—*Mathis v. Southern R. Co.*, 65 S. C. 271, 43 S. E. 684, 61 L. R. A. 824.

A common carrier of live stock is bound to furnish suitable cars for the carriage of stock, upon reasonable notice, whenever it can do so with reasonable diligence without jeopardizing its other business as carrier.—*Ayres v. Ch. & N. W. R. Co.*, 71 Wis. 372, 37 N. W. 432.

[33], [4] Duty as to furnishing of cars on sidings.

The defendant carrier, which had for some months permitted the loading of cars with coal on its sidetrack at a station, made a regulation by which it withdrew such permission, and it thereafter refused to furnish cars to be so loaded to the plaintiff or any other shipper. During such period, however, certain mine-owners had contracted with the carrier for the construction of private spur-tracks to their mines, were furnished cars, some of which they loaded from wagons while standing on such private spurs before the mines had been developed to the point of building tipples for loading.—*Held*, that the furnishing of such cars, while refusing to furnish cars for loading on the station track to plaintiff, who had built no spur track, does not constitute an undue preference or discrimination, at common law or under the Arkansas statute prohibiting the giving of any preference in the furnishing of cars.—*Harp v. Choctaw, O. & G. R. Co.*, 125 Fed. 445.

Refusal of the carrier to switch cars to plaintiff's side track without advance payment of demurrage charges is unlawful, even where plaintiff had refused to pay such charges on certain cars previously delivered to him without prepayment.—*Macloon v. Ch. & N. W. R. Co.*, 3 Inters. Com. R. 452, 711, 5 I. C. C. R. 84.

Under the statute of Minnesota requiring a carrier to furnish cars upon reasonable notice, if a railroad itself furnished suitable warehouse facilities for receiving, handling and storing all grain designed for transportation over its road, it might designate such warehouse or elevator as the exclusive place at which it would receive grain for shipment at that station, and refuse to receive it or furnish cars for its shipment at any other place; but in case of failure to furnish these facilities, then it should be required to allow others to build warehouses adjacent to its track or else build sidetracks to warehouses near the station, so that the public would be furnished with proper facilities; and this implies the furnishing of cars in which to ship grain from such warehouses.—*Rhodes v. No. Pac. R. Co.*, 34 Minn. 87, 24 N. W. 347.

[5] Necessity for tender of goods.

If the carrier refuses to furnish cars, on demand by shipper, it is not necessary that he should prepare and tender the goods.—*Houston, E. & W. T. R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225n.

[6] Applications for cars.

A statute of Texas rendered carriers liable to a penalty for failure to deliver cars to shippers within six days after written demand for the same. A shipper, when applying for cars, requested that the cars be delivered "as soon as possible."—*Held*, that no penalty could be recovered for failure to deliver cars within six days.—*Texas & P. R. Co. v. Shipman*, 17 Tex. Ct. R. 152, 98 S. W. 449.

The local agent of the station at which cars are desired has authority to receive applications therefor.—*Texas & P. R. Co. v. Allen*, 17 Tex. Ct. R. 256, 98 S. W. 450.

The Texas statute required "the written application" of the shipper for cars to state "the number of cars desired, the place at which they are desired, and the time they are desired." Plaintiff's application asked for a specified number at a specified place "as soon as possible."—*Held*, that this specified no time whatever, and the application could not be the basis of a suit to recover a forfeiture.—*Texas & P. R. Co. v. Hughes*, 14 Tex. Ct. R. 894, 91 S. W. 567.

"Reasonable notice" by a shipper to a carrier that he will require cars for the transportation of freight is such a notice as will enable the carrier, with reasonable diligence under the circumstances then existing, to furnish the cars without interfering with previous orders from other shippers at the same station, or jeopardizing its business on other portions of its road.—*Ayers v. Ch. & N. W. R. Co.*, 71 Wis., 372, 37 N. W. 432.

[7] Notice of inability to furnish.

A carrier having reason to anticipate its inability to furnish cars for which it has received requisition, must advise the shipper, in order to excuse itself from liability for failure to furnish cars.—*Di Giorgio I. & S. Co. v. Pa. R. Co.*, 104 Md. 693, 65 Atl. 425.

[8] Unprecedented rush of business as justification.

Carrier not liable for delay caused by temporary excess of business,—see post, § 38, note [29].

Extraordinary accumulations of freight, offered suddenly and in unusual quantities, do not require a carrier to furnish sufficient cars at once, nor do more than furnish cars as fast as practicable, ratably and without discrimination.—*Riddle Co. v. B. & O. R. Co.*, 1 Inters. Com. R. 701, 1 I. C. C. R. 372; *St. Louis S. W. R. Co. v. Clay Gin Co.*, 77 Ark. 357, 92 S. W. 531.

Where it appears that under ordinary circumstances a railroad furnishes ample rolling stock for transportation of passengers and freight, delay in the transportation of goods is justifiable in an unusual press of business, provided no unfair preference is given to any shipper.—*Bouker v. L. I. R. Co.*, 89 Hun (N. Y.), 202, 35 N. Y. Supp. 23.

An unprecedented demand for cars is an excuse for failure of a carrier to furnish cars upon application.—*Wibert v. N. Y. & E. R. Co.*, 19 Barb. (N. Y.) 36; *affd.* 12 N. Y. 245; *St. Louis S. W. R. Co. v. Leder Bros.*, 79 Ark. 59, 95 S. W. 170; *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488; *Louisville & N. R. R. Co. v. Queen City Coal Co.*, 99 Ky. 217, 18 Ky. L. R. 126, 35 S. W. 626; *Yazoo & M. V. R. Co. v. McKay*, — Miss. —, 44 So. 780; *Yazoo & M. V. R. Co. v. Blum*, 89 Miss. 242, 42 So. 282.

It is the duty of common carriers to furnish transportation facilities, for such goods as they undertake to carry, to all who apply in the regular and expected course of business, but where there is an unusual and unexpected press of business, such as the carrier could not by ordinary prudence have contemplated, he is excused for not having anticipated and provided against such extraordinary conditions.—*St. Louis, I. M. & S. R. Co. v. Wynne Hoop Co.*, 81 Ark. 373, 99 S. W. 375; *Houston & T. C. R. Co. v. Smith*, 63 Texas, 322.

When a carrier has furnished itself with the appliances necessary to transport the amount of freight which may, in the usual course of events, be reasonably expected to be offered to it for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may only occur in a given locality temporarily, or at long intervals of time.—*State ex rel. Crandall v. C. B. & Q. R. Co.*, 72 Neb. 542, 101 N. W. 23; *State ex rel. McComb v. C. B. & Q. R. Co.*, 71 Neb. 593, 99 N. W. 309.

A carrier cannot justify delay in handling local shipments on the ground of insufficiency of cars and great volume of traffic from distant or foreign points, when such condition was due to the carrier's own acts in offering special inducements to such traffic.—*Branch v. Wilmington & W. R. Co.*, 77 N. C. 347.

It is the extent of business ordinarily done which properly measures the carrier's obligation to furnish transportation.—*Ayres v. Ch. & N. W. R. Co.*, 71 Wis. 372, 37 N. W. 432.

[9] Duty to pro-rate.

Carriers' regulations as to transportation of private cars to be published in schedules,—see ante, § 28, note [18].

The provision of the Constitution of Colorado that "no railroad company shall give any preference to individuals, associations or corporations in furnishing cars or motive power" imposes no greater obligation on a carrier than the common law imposed.—*Atchison, T. & S. F. R. Co. v. D. & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. R. (U. S.) 185, revg. s. c. 13 Fed. 546.

Under the provisions of Interst. Com. Act, § 3, it is the duty of a carrier, in furnishing cars along its line, where a limited number only can be supplied, to distribute the same impartially, without unjust discrimination or favoritism.—*U. S. ex rel. Kingwood Coal Co. v. W. Va. Northern R. Co.*, 125 Fed. 252; *affd.* 134 Fed. 198.

Where the supply of cars is less than the demand, it is the duty of the carrier to pro-rate the supply among all the shippers, without unjust discrimination.—*U. S. ex rel. Coffman v. Norfolk & W. R. Co.*, 109 Fed. 831.

In times of temporary car famine, a railroad can only be required to do its best and to treat its patrons without undue preference.—*Hawkins v. Wheeling & L. E. R. Co.*, 9 Inters. Com. R. 212.

In the distribution of cars, a carrier may not discriminate between competitive and non-competitive points.—*Hawkins v. L. S. & M. S. R. Co.*, 9 Inters. Com. R. 207; *Hawkins v. Wheeling & L. E. R. Co.*, 9 Inters. Com. R. 212.

If a carrier accepts and uses cars owned by shippers or others, in a legal sense it adopts them as its own, and cannot discriminate as to other shippers by means of them.—*Rice v. W. N. Y. & P. R. Co.*, 1 Inters. Com. R. 717, 792, 795, 811, 2 Inters. Com. R. 298, 4 I. C. C. R. 131.

That cars could be more profitably used, or meet the wants of a larger number of shippers elsewhere, does not justify refusing an applicant a fair allotment.—*Riddle Co. v. N. Y. L. E. & W. R. Co.*, 1 Inters. Com. R. 787, 1 I. C. C. R. 594.

When by reason of an unprecedented rush of business, a carrier is unable to furnish cars to all sufficient for their needs, it should furnish to all shippers what cars were available, without discrimination.—*Riddle Co. v. B. & O. R. Co.*, 1 Inters. Com. R. 701, 1 I. C. C. R. 372; *St. Louis S. W. R. Co. v. Clay Gin Co.*, 77 Ark. 357, 92 S. W. 531.

The ordinary duty of exercising reasonable care and diligence in furnishing cars adequate for the transportation of freight does not impose on the railroad the duty of discriminating in favor of the complaining shipper where the demands exceeded the capacity of the railroad and the anticipated or usual calls upon it.—*Strough v. N. Y. C. & H. R. R. Co.*, 92 App. Div. (N. Y.) 584, 87 N. Y. Supp. 30; *affd.* 181 N. Y. 533, 73 N. E. 1133.

When by reason of a press of business, a carrier cannot accept all property tendered for transportation, it cannot therefore favor some customers and refuse the goods of others, but must act on the rule of equality.—*Houston & T. C. R. Co. v. Smith*, 63 Tex. 322.

The rights of all shippers of live stock applying for cars under the same circumstances are necessarily equal.—*Nichols v. Oregon Short L. R. Co.*, 24 Utah, 83, 66 Pac. 768.

[10] Preference to shipments of perishable property.

Preference in forwarding shipments of perishable property not unjust discrimination,—see ante, § 32, note [14].

Where a carrier is unable to immediately transport all property deliverable to it for carriage, it may, and it is its duty to, give preference to that which is perishable.—*Tierney v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 305, *affg. s. c.* 10 Hun (N. Y.), 569.

Where more property was delivered to a railroad than it could immediately transport, it is liable for injury to perishable goods caused by delay through a failure to give such goods preference over non-perishable goods.—*Tierney v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 305, *affg. s. c.* 10 Hun (N. Y.), 569.

[11] Method of distribution.

A rule of a railroad company provided that all orders for cars for use in the transportation of shipments of grain from warehouses must come through the warehousemen operating such houses. In cases of car-shortage the warehousemen were thus enabled to obtain cars for their own grain and by failing to order cars for the shipment of the grain of other persons which was stored in their warehouses, such warehousemen obtained a great advantage over other storers and shippers of grain.—*Held*, that it was the duty of the railroad to require fair treat-

ment for storers of grain under this rule, or to abrogate the rule and formulate one to meet the exigencies of the occasion.—*U. S. v. Oregon R. & N. Co.*, 159 Fed. 975.

A rule of a railroad as to distribution of cars, providing that cars for the fuel supply of that railroad, foreign railroad cars especially consigned for the fuel supply of the railroads consigning such cars, and individual cars assigned by the owners to specified mines for loading, will be charged against the capacity of the mine at which they are placed, is not an unreasonable or discriminatory regulation.—*Logan Coal Co. v. Pa. R. Co.*, 154 Fed. 497.

Where a consumer of a commodity sends cars to receive that commodity for transportation, they are not to be included in a percentage distribution of cars of the railroad among shippers.—*U. S. v. B. & O. R. Co.*, 154 Fed. 108.

Under Interst. Com. Act, § 1, relative to the furnishing of cars to shippers, where there are not sufficient cars to supply all demands and distribution on a percentage basis is necessary, all the car equipment, including the private cars of shippers, must be taken into calculation, and it is inequitable to deduct the number of private cars from the total car equipment, and then make a percentage distribution of the balance.—*U. S. v. B. & O. R. Co.*, 154 Fed. 108.

Where a railroad purchases coal from mine owners and sends its cars over the lines of another road to receive the coal for transportation, these cars are not to be taken into consideration in the distribution of the cars of the latter road on a percentage basis in cases of car shortage.—*U. S. v. B. & O. R. Co.*, 154 Fed. 108.

When individual shippers own their own cars, it is not unreasonable that they shall have the exclusive use of the same.—*U. S. v. B. & O. R. Co.*, 154 Fed. 108.

In a mandamus proceeding against a carrier to prevent discrimination in its distribution of cars among rival coal companies, it was admitted that the defendant owned no cars but obtained them from another railroad and allotted them to the mining districts according to a formulated rating.—*Held*, that the court had power to fix the percentage of cars which the carrier should furnish to the complainant's mines in proportion to their present output, there being nothing to indicate any probable change in such output.—*West Va. Northern R. Co. v. U. S.*, 134 Fed. 198, affg. s. c. 125 Fed. 252.

In determining the distribution of coal cars, the equipment in use at the mines for handling and loading is of secondary importance, because such equipment may, and doubtless would be speedily increased, if more cars were allotted.—*U. S. ex rel. Kingwood Coal Co. v. W. Va. Northern R. Co.*, 125 Fed. 252; affd. 134 Fed. 198.

In furnishing cars to local mines, the distribution should be based on a disinterested and intelligent examination of the different mines by experts, and upon a consideration of all the factors which go to make up the capacity of such mines, both actual and potential.—*U. S. ex rel. Kingwood Coal Co. v. W. Va. Northern R. Co.*, 125 Fed. 252; *aff'd*, 134 Fed. 198.

A system of coal car distribution which a carrier has adopted in a given district affords no just complaint to any shipper if, under the circumstances and conditions of that particular field, it is a fair and reasonable one, and is applied to all alike.—*U. S. v. Norfolk & W. R. Co.*, 109 Fed. 831.

That special or private cars are furnished by one shipper, does not justify discrimination in furnishing cars, and in the stress of unusual business, such special cars in its service should be applied to the accommodation of all shippers alike.—*U. S. v. Norfolk & W. R. Co.*, 109 Fed. 831.

If all shippers applying cannot be provided with desired facilities, the plan or method adopted should be the one affording the largest public accommodation with the smallest amount of individual hardship.—*Palmer's Board of Trade v. Pa. R. Co.*, 9 Inters. Com. R. 61.

[12] Effect of agreement as to distribution.

A mere arrangement between a railroad company and its patrons, relating solely to the basis upon which an equitable and fair distribution of cars could be secured, does not relieve the railroad from the obligations as to the distribution of cars imposed by Interst. Com. Act, § 3; nor does the shipper lose the rights and remedies given by § 23 of the Act.—*U. S. v. Norfolk & W. R. Co.*, 143 Fed. 266, *rev'd* s. c. 138 Fed. 849.

An agreement between the shippers and a carrier in a particular field, as to what would be an equitable basis for distribution of cars therein, does not prevent one of such shippers from proceeding against said carrier to compel it to furnish such shipper an equitable proportion of the available cars.—*U. S. v. Norfolk & W. R. Co.*, 143 Fed. 266, *rev'd* s. c. 138 Fed. 849.

[13] Facts showing unjust discrimination.

Where it is shown that, under a rule of a railroad providing that all orders for cars for use in the transportation of shipments from warehouses must come through the warehousemen operating such warehouses, in times of car-shortage the warehousemen are able to get cars for their own shipments while they ignore the demands of storers and shippers for cars, facts are proved which show an undue discrimination in favor of the warehousemen and against such other shippers.—*U. S. v. Oregon R. & N. Co.*, 159 Fed. 975.

The carrier neglected and refused to furnish cars to complainants when it might reasonably have done so, and at the same time furnished cars to complainant's competitors engaged in the same line of business at the same place.—*Held*, that this constituted an unlawful discrimination.—*Gallooly v. C. H. & D. R. Co.*, 11 Inters. Com. R. 1.

The mere showing of a carrier's rule of car apportionment to be that regardless of the number of carloads shippers may have ready for shipment, the first car goes to the shipper who placed the first order, the second to the second order, and so on until the supply is exhausted, is not, with a bare statement that the rule works a discrimination, sufficient to establish discrimination, but the actual effect of the rule must be shown.—*Richmond Elev. Co. v. Pere Marquette R. Co.*, 10 Inters. Com. R. 629.

Facts held to show an unjust discrimination in furnishing cars.—*Richmond Elev. Co. v. Pere Marquette R. Co.*, 10 Inters. Com. R. 629.

Preferring, in the furnishing of cars, shippers who own spur tracks rather than those who do not but use and thereby obstruct the carrier's general lines, is not an unlawful discrimination, so long as all in the same position are treated alike.—*Choctaw, O. & G. R. Co. v. State*, 73 Ark. 373, 84 S. W. 502.

[14] Penalties for failure to furnish cars—Validity of statutes.

A Texas statute required that upon application in due form by a shipper, a railroad must furnish sufficient cars for his consignment, regardless of every other consideration except strikes and public calamities. In the state courts, the statute was construed to apply to applications for cars for shipments out of the state.—*Held*, this was an attempt to regulate interstate commerce, and beyond the police power of the state.—*Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 26 Sup. Ct. R. (U. S.) 491.

A state statute imposing penalties on carriers for failure to ship freight within five days, is valid and operative as to freight to be shipped outside the state.—*Bagg v. Wilmington & R. Co.*, 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596.

A state statute imposing a penalty on a carrier for failure to furnish cars within six days after written demand therefor by a shipper, is void as a regulation of interstate commerce.—*Texas & P. R. Co. v. Allen*, 17 Tex. Ct. R. 256, 98 S. W. 450.

A state statute providing for penalties for the failure of a railroad corporation to furnish cars upon demand, is valid as to intrastate commerce, although invalid as to interstate commerce.—*Allen v. Tex. & P. R. Co.*, — Tex. —, 101 S. W. 792.

[15] — Construction of statutes.

General rules of statutory construction,—see ante, § 1, notes [23]-[40].

Statute providing penalties for failure to furnish cars construed as penal,—see ante, § 1, note [35].

A statute requiring carriers to furnish cars and prescribing penalties for non-compliance, will be strictly construed, and hence does not require the furnishing of cars beyond its own line.—*Houston & T. C. R. Co. v. Buchanan*, 15 Tex. Ct. R. 521, 94 S. W. 199.

A statute authorizing the recovery of a forfeiture from a railroad for its failure to furnish cars, etc., is highly penal, and he who seeks to recover must bring himself strictly within the law.—*Texas & P. R. Co. v. Hughes*, 14 Tex. Ct. R. 894, 91 S. W. 567.

[16] — What constitute separate offenses.

Under the North Carolina statute, a carrier refusing to transport cattle is liable to a separate penalty for each animal in the shipments refused.—*Carter v. Wilmington & W. R. Co.*, 129 N. C. 213, 39 S. E. 327.

In an action to recover a penalty for refusal to transport cattle, recovery may be had for each head of cattle and for each day's refusal, as separate offenses.—*State ex rel. Carter v. Wilmington & W. R. Co.*, 126 N. C. 437, 36 S. E. 14.

[17] Actions for failure to furnish cars or discrimination in so furnishing — Nature of action.

An action for failure to furnish cars requested by plaintiff, the carrier having accepted his requisition, lies in tort, not on contract.—*Di Giorgio I. & S. Co. v. Pa. R. Co.*, 104 Md. 693, 65 Atl. 425.

[18] — Right of action.

Parol agreement to furnish cars, if broken, makes carrier liable for delay,—see post, note [30].

Whether statutory remedies supplant existing rights of action,—see post, § 40, note [2].

A railroad company is liable in damages if it discriminates against a particular grain elevator in the furnishing and handling of cars.—*Kellogg v. Sowerby*, 93 App. Div. (N. Y.) 124, 87 N. Y. Supp. 413.

If those in charge of the carrier's cars, whose duty it was to assign, or give them out to be loaded with grain, through trickery or from motives of partiality or from oppression, gave them to persons by the course and usage of the company or in fact not rightfully entitled to them, and

thereby deprived the complaining shipper of the facilities he should have had for shipping his grain, he is entitled to such damages as he may have sustained therefor.—*Galena & C. U. R. Co. v. Rae*, 18 Ill. 488.

[19] — Pendency of other proceeding.

Complainants brought an action in a state court for damages for discrimination in furnishing cars. Later they brought a proceeding for reparation before the Interstate Commerce Commission, because of the same abuses.—*Held*, that the pendency of the action in a state court did not bar the latter proceeding, though its pendency in a federal court would have had that effect.—*Gallogly v. C. H. & D. R. Co.*, 11 Inters. Com. R. 1.

[20] — Defenses.

In an action by a shipper against a carrier for refusing to furnish cars, it is not competent for it to prove the consignee's delays in unloading previous shipments. The carrier's remedy is against such consignee for demurrage.—*Houston, E. & W. T. R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225n.

In an action for damages for failure to furnish cars, the carrier cannot contend that the cars were desired for shipments outside the state, unless its legal right to refuse such a request was asserted at the time the cars were asked for.—*Houston & T. C. R. Co. v. Buchanan*, 11 Tex. Ct. R. 1005, 84 S. W. 1073.

[21] — Pleading and proof.

An allegation that timber was placed near carrier's side track, and that a freight conductor and two station agents of carrier were requested to furnish a car for its shipment, does not show tender or receipt, enabling recovery for failure to transport.—*St. Louis, I. M. & S. R. Co. v. Lee*, 69 Ark. 584, 65 S. W. 99.

In an action to recover for failure to furnish cars, an allegation that plaintiff made demand of defendant is sufficient to admit proof as to the agent upon whom the demand was made, and that he had authority to furnish cars.—*St. Louis, I. M. & S. R. Co. v. Wynne Hoop Co.*, 81 Ark. 373, 99 S. W. 375.

In an action to recover for the failure of a railroad to furnish cars, the allegation in the complaint that "the plaintiff had placed a lot of elm saw logs along defendant's tracks for shipment, and had made often and repeated demands of defendant for cars upon which to load and ship out logs" sufficiently alleges a tender for shipment and a demand for cars.—*St. Louis, I. M. & S. R. Co. v. Wynne Hoop Co.*, 81 Ark. 373, 99 S. W. 375.

[22] — Questions for jury.

In an action to recover for failure of a railroad to furnish cars on demand, evidence was introduced by the railroad tending to show a sufficient equipment for the usual demands, and that the failure to furnish cars was due to an unusual press of business.—*Held*, that the questions whether the railroad was properly equipped to supply the real demand; whether there was an unprecedented demand which could not reasonably have been anticipated; whether the railroad was permitting its cars to be in the service of other roads to obtain rent therefrom instead of using them to supply its public demands, or whether they were unavoidably out of reach at the time of the alleged unprecedented demand, were questions for the jury.—*St. Louis S. W. R. Co. v. Leder Bros.*, 79 Ark. 59, 95 S. W. 170.

[23] — Measure of damage.

Reparation for discrimination in furnishing cars should not include probabilities of profit, but should include all that may with reasonable certainty be directly charged to such unfair treatment.—*Eaton v. C. H. & D. R. Co.*, 11 Inters. Com. R. 619.

The petitioner had the carrier build side tracks to his mill, so that unloading could be made directly from the cars. For other mills, which did not have such side tracks, the carriers paid the cost of cartage. Because of the failure of the company to furnish cars on the side track, he had to cart to and from the main line.—*Held*, that his measure of damages was the amount per load paid by the carrier to the other shippers.—*Hazel M. Co. v. St. L. A. & T. H. R. Co.*, 2 Inters. Com. R. 571, 3 Inters. Com. R. 701, 5 I. C. C. R. 57.

The measure of damages for failing to furnish cars as agreed is the difference between the value of the cattle at the place of destination when they did arrive there and when they should have arrived there.—*Texas & P. R. Co. v. Nicholson*, 61 Tex. 491.

[24] Indictment.

An indictment for an unreasonable discrimination by failure to give a shipper his proper share of cars, which charges the offense in the language of the statute but does not describe the offenses intended to be alleged is insufficient.—*U. S. v. B. & O. R. Co.*, 153 Fed. 997.

[25] Regulation of special services — Definitions.

What constitutes "switching,"—see ante, § 2, note [9].

Switching of cars not interstate commerce,—see ante, § 25, note [2].

Right to charge higher rate to cover cost of switching,—see ante, § 26, note [35].

What is a reasonable terminal charge,—see ante, § 26, note [37].

Rules and regulations as to storage and demurrage should be stated in schedules,—see ante, § 28, note [18].

Discriminations in terminal charges,—see ante, § 31, note [62].

Switching charges which do not pay cost of service not enforceable,—see post, § 49, note [32].

“Switching” or “transfer service” occurs only in connection with a “transportation” of the freight over a railway and where the entire service is rendered on spur-tracks of a railroad company it is “transportation” and not “switching” for which transportation and not switching charges may be made.—*Dixon v. Central of Ga. R. Co.*, 110 Ga. 173, 35 S. E. 369.

The phrase “for more than five days,” in a demurrage statute, means five full days, five running days, Sundays, etc., to be counted.—*Branch v. Wilmington & W. R. Co.*, 77 N. C. 347.

[26] — Right to exact demurrage charges.

A railroad may make a regulation compelling the payment of demurrage charges if goods are not unloaded within a certain time, provided the time allowed for unloading is reasonable and the charge is not excessive.—*Miller v. Ga. R. & B. Co.*, 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323.

After allowing a shipper a reasonable time to unload, a carrier is entitled to a reasonable car service, storage or demurrage fee, and to a lien on the freight for such charges.—*Schumacher v. Ch. & N. W. R. Co.*, 207 Ill. 199, 69 N. E. 825, affg. s. c. 108 Ill. App. 520, distinguishing *Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 588.

The right to demurrage does not exist in favor of railroads.—*Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 588; distinguished, 207 Ill. 199, 69 N. E. 825.

[27] — Reasonableness of demurrage charges.

Duty of carrier to make reasonable demurrage and storage charges,—see ante, § 26, note [29].

Discriminations in demurrage charges,—see ante, § 31, note [62].

Proper basis for computing demurrage charges,—see post, § 49, note [40].

A demurrage charge of \$1 per day for the time a car loaded remains standing on the tracks of the carrier before being unloaded, after the first 96 hours, deducting holidays, Sundays and rainy days, is not unreasonable.—*Michie v. N. Y. N. H. & H. R. Co.*, 151 Fed. 694.

A demurrage charge is not properly based upon the fair rental value of the car. It is in the nature of a penalty, to insure the consignee will

promptly receive his freight.—*Kehoe v. Charleston & W. C. R. Co.*, 11 Inters. Com. R. 166.

One dollar per day is the demurrage charge universally named by car service associations in all parts of the country in case of car-load freight, and the same amount is generally, if not uniformly, fixed by railroad commissions invested with power to make rates and regulations. Such a charge is just and reasonable, upon the facts of this case.—*Kehoe v. Charleston & W. C. R. Co.*, 11 Inters. Com. R. 166.

In demurrage charges, refunds on account of delays because of weather must be *bona fide* and not arbitrary.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

The charging of demurrage, before a reasonable time for loading or unloading has elapsed, would, so far as that charge covers time which should be embraced in a reasonable time, be an unjust or unreasonable charge for a "service rendered in connection with the transportation of property" or "for the storage or handling" of such property.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

A demurrage charge of \$1 per day for each car is not necessarily unreasonable because the cars vary in capacity.—*Miller v. Ga. R. & B. Co.*, 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323.

Charging a shipper \$1 per day for the use of a car during the time the law allows him for loading it, is extortionate.—*St. Louis S. W. R. Co. v. Rutherford*, 16 Tex. Ct. R. 179, 96 S. W. 73.

[28] — Allowance of time for unloading.

The differences in the length of time before demurrage charges begin should not be undue, as between various localities.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

Forty-eight hours is an unreasonably small allowance of time for unloading where any portion of it has to be consumed in attending to the preliminaries necessarily antecedent to the actual work of unloading. The period also should not begin to run until the cars have been placed for unloading and notice of the placing has been given to the proper party.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

Allowance of 96 hours free car service on one commodity and only 48 hours on another, is not an unlawful discrimination.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

A 96-hour free car service rule at a given point is not discriminative, if it is not allowed to one shipper of a given commodity and denied to another.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

In determining what is a reasonable time for unloading, before a demurrage charge can begin, the distance which the freight must be hauled

by the consignee is not an element for consideration.—*Schumacher v. Ch. & N. W. R. Co.*, 207 Ill 199, 69 N. E. 825, affg. s. c. 108 Ill. App. 520, distinguishing *Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 588.

[29] — Carrier's lien for demurrage.

See also, ante, [26].

A demurrage claim, though valid, does not give the carrier a lien on the goods, but he must enforce his claim by an action for breach of contract, not by detention of the goods.—*Crommelin v. N. Y. & H. R. Co.*, 4 Keyes (N. Y.), 90, affg. s. c. 10 Bosw. (N. Y.) 77.

A carrier has no lien for demurrage on property in cars transported over its lines.—*Wallace v. B. & O. R. Co.*, 216 Pa. 311, 65 Atl. 665.

A carrier has no lien on freight for demurrage for delay in unloading, and no right to retain possession of the goods until it is paid.—*Nicallette Lumber Co. v. People's Coal Co.*, 213 Pa. 379, 62 Atl. 1060.

[30] — When state has jurisdiction.

A car of coal not yet delivered to the consignee, but standing on the track of the railway in the condition in which it was brought from another state, is still under exclusive federal regulation.—*McNeill v. So. R. Co.*, 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722.

Carloads of coal shipped from one state to another remain objects of interstate commerce until delivered to the consignee. Therefore an order of the state corporation commission of North Carolina directing the carrier to place such cars on a certain track for unloading, as requested by the consignee, is not within the jurisdiction of such commission.—*Southern R. Co. v. Greenboro I. & C. Co.*, 134 Fed. 82; affd. 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722.

The switching of cars by a carrier is a local service, the charges for which a state commission may regulate even as to cars destined interstate.—*Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. 849.

A car being hauled from one of the carrier's yards to another, preparatory to going upon the main line bound for its destination in another state, is engaged in interstate commerce.—*U. S. v. P. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 696.

If a carload of hay is consigned to a particular warehouse, the carrier delivers it at the warehouse, if upon its tracks, or to the proper switching road if not. If no point of delivery is named in the consignment, and no directions have been given before the arrival of the car, the carrier places it upon its team track. When the car has been disposed of in the above manner, the service of the railway in respect of that shipment is

complete, the car having been properly placed for delivery of its contents. If the consignee then sells to the complainant, and the carrier, at the order of the original consignee or the complainant, moves the car to the latter's storehouse, that is a new and independent service, for which a reasonable additional charge may be made, and if performed wholly within the state, not within the jurisdiction of the Interstate Commerce Commission.—*St. Louis Hay & G. Co. v. C. B. & Q. R. Co.*, 11 Inters. Com. R. 82.

[31] — Power of commissions.

Power of Commission as to switching and demurrage charges;—see post, § 49, note [10].

In the absence of congressional authorization, the Interstate Commerce Commission has no power to require that shippers shall be allowed a certain length of time after the arrival of the car in which to designate the point of delivery.—*St. Louis Hay & G. Co. v. C. B. & Q. R. Co.*, 11 Inters. Com. R. 82.

[32] — Demurrage charges as violations of long and short haul rule.

The long and short haul rule of the Interstate Commerce Act does not apply to rates of which a part are demurrage charges; but if such demurrage charges when added to transportation rates, result in greater aggregate charges in certain cases than in other cases involving longer hauls, this may constitute an undue preference as between localities.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

§ 38. Liability for damage to property in transit; * [duty of carrier to furnish bill of lading; limitation of liability; liability for loss by delay; regulations as to baggage].— Every common carrier and every railroad corporation and street railroad corporation shall, upon demand, issue either a receipt or bill of lading for all property delivered to it for transportation. No contract, stipulation or clause in any receipt or bill of lading shall exempt or be held to exempt any common carrier, railroad corporation or street railroad corporation from any liability for loss, damage or injury caused by it to freight or property from the time of its delivery for transportation until the same shall have been received at its destination and a reasonable time shall have elapsed after notice to consignee of

* Words in brackets are not a part of section heading as enacted.—Ed.

such arrival to permit of the removal of such freight or property. Every common carrier, railroad corporation and street railroad corporation shall be liable for all loss, damage or injury to property caused by delay in transit due to negligence while the same is being carried by it, but in any action to recover for damages sustained by delay in transit the burden of proof shall be upon the defendant to show that such delay was not due to negligence. Every common carrier and railroad corporation shall be liable for loss, damage and injury to property carried as baggage up to the full value and regardless of the character thereof, but the value in excess of one hundred and fifty dollars shall be stated upon delivery to the carrier, and a written receipt stating the value shall be issued by the carrier, who may make a reasonable charge for the assumption of such liability in excess of one hundred and fifty dollars and for the carriage of baggage exceeding one hundred and fifty pounds in weight upon a single ticket. Nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

Penalties and forfeitures for failure to give a bill of lading,—see post, § 56.

For parallel provisions of Interstate Commerce Act,—see Interst. Com. Act, § 20, post, Appendix B.

Terms on which goods will be received for transportation must be announced in published schedules,—see ante, § 28.

False billing, classification, report of weights, etc., forbidden,—see ante, § 34.

Power of Commission to order changes in time schedules, etc.—see post, § 51.

Who are common carriers,—see ante, § 2, notes [2]–[7].

What constitutes a railroad or street railroad,—see ante, § 2, note [8].

[1] Duty to give bill of lading.

Limitation of liability in general,—see post, notes [17]–[25].

Whether carriers can be compelled to give bill of lading beyond their own lines,—see ante, § 35, note [21].

There is no rule of common law which requires a common carrier to give a bill of lading.—*Johnson v. Stoddard*, 100 Mass. 306.

[2] What law governs.

The validity of a stipulation in a bill of lading limiting the carrier's liability depends on the law of the state of contract.—*Liverpool*

& *G. W. S. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. R. (U. S.) 469, affg. s. c. 22 Fed. 715, 17 Fed. 377; *Myrick v. Mich. Cent. R. Co.*, 107 U. S. 102, 1 Sup. Ct. R. (U. S.) 425, revg. Fed. Cases No. 10,001; *The Henry B. Hyde*, 82 Fed. 681; *McDaniel v. R. Co.*, 24 Iowa, 412; *Ohio & M. R. Co. v. Tabor*, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18, 34 L. R. A. 685; *Meuer v. Ch. M. & St. P. R. Co.*, 11 S. Dak. 94, 75 N. W. 323; *Pittman v. Pac. Exp. Co.*, 24 Tex. Civ. App. 595, 59 S. W. 949.

Although a state statute provides that no contract shall in any way affect the common law liability of a carrier for loss of or injury to goods transported, it seems that a valid contract can be made in that state limiting the liability of a railroad company in another state.—*Platt v. Richmond, Y. R. & C. R. Co.*, 108 N. Y. 358, 15 N. E. 393.

If any limitation of the carrier's liability is prohibited by the law of the state where the contract was made, such limitation is void and unenforceable in this state.—*Barnes v. L. I. R. Co.*, 47 Misc. (N. Y.) 318, 93 N. Y. Supp. 616; revd. on other grounds, 115 App. Div. (N. Y.) 44, 100 N. Y. Supp. 593.

A contract of carriage limiting the liability of the carrier, made in Pennsylvania where it has been held that carriers may not limit their liability for negligence, is effectual to limit the carrier's liability where the breach occurred in New York State.—*Cappel v. Weir*, 46 Misc. 441, 92 N. Y. Supp. 365.

A bill of lading is governed by the law of the state where it is issued.—*National Bank v. B. & O. R. Co.*, 99 Md. 661, 59 Atl. 134.

[3] Contents of bill.

Limitation of liability by stipulation in bill of lading,—see post, note [19].

Where instructions for shipping are out of the ordinary course and the agent consents to bill by the route indicated, it should appear on the bill of lading.—*Dewey Bros. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 481.

[4] Customs and usages.

A shipper and carrier, in contracting for transportation as to which known usages prevail, incorporate such usages by implication into their contract, if nothing to the contrary is said.—*Hostetter v. Park*, 137 U. S. 30, 11 Sup. Ct. R. (U. S.) 1.

The general course of business in the transportation of property by a common carrier, if generally established, may be shown and will govern in the construction of a general engagement for shipment of property, where the proposal of the contracting party makes

no reference to the exemptions and limitations of the carrier. Under such circumstances, the shipper is to be regarded as contemplating such usage when the proposal is made for the contract of carriage, and the carrier will be protected by limitations and exemptions contained in a bill of lading issued in pursuance of such contract.—*Hostetter v. Park*, 137 U. S. 30, 11 Sup. Ct. R. (U. S.) 1; *Donovan v. Standard Oil Co.*, 155 N. Y. 112, 49 N. E. 678; *Robertson v. National Ss. Co.*, 139 N. Y. 416, 34 N. E. 1053; *Robinson v. N. Y. & Texas Ss. Co.*, 63 App. Div. (N. Y.) 211, 71 N. Y. Supp. 424.

[5] Validity of bill of lading in general.

Whether provisions will be construed as limiting liability for negligence,—see post, note [27].

Giving of rebate does not invalidate bill of lading so as to exempt carrier from liability,—see ante, § 31, note [13].

In the absence of fraud or mistake, a shipper cannot invalidate a bill of lading containing special stipulations, by showing that he signed it without reading.—*Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649.

[6] Bill of lading as affected by allowance of rebates.

Under the Interstate Commerce Act, the allowance of rebates does not vitiate the bill of lading or the contract of affreightment, nor exempt the carrier from liability on its bill of lading.—*Merchant's Cotton Press & S. Co. v. N. A. Ins. Co.*, 151 U. S. 368, 14 Sup. Ct. R. (U. S.) 367, affg. s. c. sub nom. *Ins. Cos. v. Carrier Cos.*, 91 Tenn. 537, 19 S. W. 755

[7] Doubt as to construction of bill of lading.

Any reasonable doubt as to the proper construction of the printed portion of a bill of lading should be strictly resolved against the carrier who prepared it.—*Baltimore & O. R. Co. v. Doyle*, 142 Fed. 669.

[8] Bill of lading the sole contract.

In the absence of proof of mistake or fraud, the bill of lading, receipt or voucher is the final and sole agreement between the carrier and shipper.—*Long v. N. Y. C. R. Co.*, 50 N. Y. 76.

[9] Liability of carrier in general.

Liability on through shipments,—see post, notes [14], [15].

Limitation of liability,—see post, notes [17]–[25].

Liability of carriers for delay in transporting,—see post, notes [29]–[37].

Liability of carrier for loss of or injury to baggage,—see post, notes [41]–[42].

Giving of rebate does not invalidate bill of lading so as to exempt carrier from liability,—see ante, § 31, note [13].

In the absence of express contract, a common carrier is, at common law, liable for all loss or damage sustained by the property in its hands as carrier, unless caused by the act of God or the public enemy.—*Leitch v. Union R. Transp. Co.*, Fed. Cases, No. 8224.

If a carrier deviates from the route specified in the bill of lading, it becomes an insurer of the goods, even against unavoidable casualty.—*Maghee v. Camden & A. R. Co.*, 45 N. Y. 514; *Robertson v. National Ss. Co.*, 139 N. Y. 416, 34 N. E. 1053, revg. s. c. 17 N. Y. Supp. 459.

Where a person, intending to proceed on his journey on the next boat, which leaves the following day, delivers his baggage at the office of a transportation company, that company holds the same as common carrier, and is answerable for its safe keeping.—*Camden Transp. Co. v. Belknap*, 21 Wend. (N. Y.) 354.

A carrier is liable for damage to goods through inevitable accident, or what is termed "the act of God," if by his culpable negligence or unreasonable delay in transportation and delivery he unnecessarily exposes the goods to the peril.—*Read v. Spaulding*, 5 Bosw. (N. Y.) 395; affd. 30 N. Y. 630.

No bill of lading is necessary to create the liability of a common carrier. The mere reception of goods for the purpose of transporting them is sufficient.—*Shelton v. Merchants' D. Trans. Co.*, 36 N. Y. Super. 527; revd. on other grounds, 59 N. Y. 258.

A railroad is a common carrier, and assumes the liabilities of such as to its returning of empty oil cars to their original place of shipment, even though it receives no direct or special pecuniary compensation for such service.—*Spears v. L. S. & M. S. R.*, 67 Barb. (N. Y.) 513.

[10] Liability as warehouseman.

Duty of carrier to make reasonable storage charges,—see ante, § 26, note [29].

Rates and regulations as to depot storage to be published in schedules,—see ante, § 28, note [18].

If a consignee neglect to receipt or to receive goods, the carrier is not thereby justified in abandoning them or exposing them to injury, but may relieve himself from responsibility by placing the goods in a warehouse for and on account of the consignee, but so long as he has the custody, a duty devolves upon him to take care of the property and preserve it from injury.—*Scheu v. Benedict*, 116 N. Y. 510, 22 N. E. 1073.

Where the consignee of goods is unknown to the carrier, and his occupation, and place of residence or occupation are unknown, and said con-

signee does not call at the place of delivery for the goods, the risk of the carrier ceases upon the putting of the goods in store with a responsible third person for and on account of the owner.—*Fisk v. Newton*, 1 Denio (N. Y.), 45.

Where, after delivery of goods for shipment, prepayment of freight is demanded by the carrier, and is refused by the shipper, the carrier holds the goods as warehouseman merely.—*Dixon v. Central of Ga. R. Co.*, 110 Ga. 173, 35 S. E. 369.

[11] Reasonable notice and time for removal of goods from station.

A bill of lading provided: "The goods to be taken from the ship by the consignee immediately the vessel is ready to discharge." The steamer was docked on Saturday, and on that day, between 11 and 12 o'clock in the morning, notice was given the consignee that the goods would be discharged on Monday morning.—*Held*, that the notice to the consignee was sufficient.—*The Kate*, 12 Fed. 881.

What is meant by a "reasonable time" is such as would give a person residing in the vicinity of the place of delivery, and informed of the usual course of business on the part of the company, a suitable opportunity within the usual business hours, after the goods are ready for delivery, to come to the place of delivery, inspect the goods and take them away.—*Pinney v. 1st Div. St. Paul & Pac. R. Co.*, 19 Minn. 251; *Derosia v. Winona & St. P. R. Co.*, 18 Minn. 133.

If the consignee does not reside at the place of delivery, but has an agent there to receive the goods, of which the carrier has notice, such agent is entitled to notice of the arrival of the goods and a reasonable time to remove them.—*Pinney v. 1st Div. St. P. & P. R. Co.*, 19 Minn. 251.

Where a consignee resides elsewhere than at or in the immediate vicinity of the place of final destination of goods shipped, and has no known agent there, and his place of residence is unknown to the carrier, the carrier may place the goods in its freight-house, and after keeping them a reasonable time, if the consignee does not call for them, its liability as carrier ceases and it remains liable simply as warehouseman.—*Derosia v. Winona & St. P. R. Co.*, 18 Minn. 133.

Where a car containing freight is set out for removal at the place of destination at 6.00 P. M. on January 22d, and the same was burned eight hours later, the consignee cannot be said to have had a reasonable time to remove the freight.—*Scott Co. v. St. L. I. M. & S. R. Co.*, — Mo. App. —, 104 S. W. 924.

[12] Power of state to regulate.

General power of state to regulate property devoted to public use,— see ante, § 1, notes [1]–[22].

Exemption from public control,— see ante, § 1, notes [16]–[21].

Effect of receivership on power to regulate,— see ante, § 2, note [15].

In the absence of action by Congress, a state may determine, augment, or lessen a carrier's liability.—*Martin v. Pittsburg & L. E. R. Co.*, 203 U. S. 284, 27 Sup. Ct. R. (U. S.) 100.

In the absence of congressional legislation on the subject, a state may require common carriers, although in the execution of interstate business, to be liable for the whole loss resulting from their negligence, in spite of a contract to the contrary.—*Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. R. (U. S.) 132.

[13] Scope and validity of statutes.

Construction of statutes declaratory of common law,— see ante, § 1, note [31a].

General rules of statutory construction,— see ante, § 1, notes [23]–[40].

Purpose of regulative acts,— see ante, § 1, note [32].

State statute prohibiting limitation of liability not a regulation of interstate commerce,— see ante, § 25, note [16].

Whether an act regulating bills of lading is a regulation of interstate commerce,— see ante, § 25, note [16].

Whether a statute imposing a penalty for failure to pay claims for loss or damage within a given time is a regulation of interstate commerce,— see ante, § 25, note [16].

A Georgia statute imposing on the initial or any connecting carrier the duty of tracing the freight and informing the shipper, in writing, when, where, how and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information could be established, was held by the Supreme Court of that state to apply to shipments outside the state.—*Held*, that the Supreme Court of the United States must accept that construction of the statute, but the act is void as applied to shipments from Georgia to other states.—*Central of Ga. R. Co. v. Murphey*, 196 U. S. 194, 25 Sup. Ct. R. (U. S.) 218.

A federal statute requiring a carrier to inform a shipper whether the loss of the shipment occurred on its line, is valid.—*Richmond & A. R. Co. v. Patterson T. Co.*, 169 U. S. 311, 18 Sup. Ct. R. (U. S.) 335.

A state law requiring all bills of lading to be signed by both parties, is valid, as a rule of evidence.—*Richmond & A. R. Co. v. Patterson T. Co.*, 169 U. S. 311, 18 Sup. Ct. R. (U. S.) 335.

A section of the Code of Virginia provided that when a carrier accepted goods for transportation beyond its own lines, it should be deemed to have assumed an obligation for the safe carriage to the point of destination unless the carrier be released from liability by written contract; and that although there be such contract, if such goods be lost or injured, such carrier should be liable unless it give satisfactory proof that the loss or injury did not occur while the goods were in its charge.—*Held*, that the statute did not attempt to substantially control or regulate contracts for interstate shipments, but simply established a rule of evidence ordaining the character of proof by which a carrier might show its liability to be limited to his own line.—*Richmond & A. R. Co. v. Patterson T. Co.*, 169 U. S. 311, 18 Sup. Ct. R. (U. S.) 335.

An Iowa statute provided that "No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into."—*Held*, that this is a matter of the law of the particular state, and may be changed by its legislature, except so far as restrained by its Constitution or the Constitution or the laws of the United States. This statute is not a regulation of interstate commerce and not a violation of the Constitution of the United States.—*Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. R. (U. S.) 289, affg. s. c. 95 Iowa, 260. 63 N. W. 692.

A state statute, providing that no contract shall exempt any railroad from any liability as a common carrier which would have existed if no contract had been made, is not an encroachment on the interstate commerce clause of the U. S. Constitution.—*Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. R. (U. S.) 289, affg. s. c. 95 Iowa, 260, 63 N. W. 692.

Requirements of a state statute as to the contents and effect of a bill of lading are void, as to interstate shipments, if in conflict with the Interstate Commerce Act.—*Baird v. St. Louis, I. M. & S. R. Co.*, 41 Fed. 592.

An interstate contract of shipment is an entire contract, and the laws of the state as to bills of lading, etc., are void in so far as they attempt to regulate interstate commerce.—*Carton v. Ill. Cent. R. Co.*, 59 Iowa, 148, 13 N. W. 67.

An act making the specification of weights in bills of lading conclusive evidence of such weights is unconstitutional.—*Missouri, K. & T. R. Co. v. Simonson*, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765.

A state law prohibiting a carrier from limiting its liability by a stipulation in the bill of lading will be upheld, though it affects the performance of a contract in another state.—*Brockaway v. Express Co.*, 168 Mass. 257, 47 N. E. 87; *Fonseca v. Cunard Ss. Co.*, 153 Mass. 553, 27 N.

E. 665, 12 L. R. A. 340n; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335; *Fairchild v. Phila. W. & B. R. Co.*, 148 Pa. 527, 24 Atl. 79; *Pittman v. Pac. Exp. Co.*, 24 Tex. Civ. App. 595, 59 S. W. 949; *Davis v. Ch. M. & St. P. R. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654.

A Texas statute providing that carriers shall not restrict their common law liability applies only to shipments beginning and ending in Texas.—*Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455.

A state statute prohibiting carriers from limiting their common law liability may apply to interstate shipments beginning within the state.—*Pittman v. Pac. Exp. Co.*, 24 Tex. Civ. App. 595, 59 S. W. 949.

[14] Liability of carriers on through shipments.

Liability of railroad for transportation and delivery of passengers and freight received by it to be transferred to points on connecting railroads,—see N. Y. R. R. L., § 48.

Liability of connecting carriers for delay in transportation,—see post, note [29].

Liability of connecting carrier for through transportation of passengers,—see ante, § 35, note [31].

An initial carrier will not be held liable beyond its own lines unless a contract so extending its liability is made out by clear evidence.—*Myrick v. Mich. Cent. R. Co.*, 107 U. S. 102, 1 Sup. Ct. R. (U. S.) 425, revg. s. c. Fed. Cases, No. 10,001.

Making a through rate on the receipt of cattle does not establish the liability of the initial carrier beyond its own line.—*Myrick v. Mich. Cent. R. Co.*, 107 U. S. 102, 1 Sup. Ct. R. (U. S.) 425, revg. s. c. Fed. Cases. No. 10,001.

Whenever two or more railroad companies are connected together, any company owning either of said roads receiving freight to be transported to any place on the line of either of said roads is liable as common carrier for the delivery of such freight at its destination.—*Smeltzer v. St. L. & S. F. R. Co.*, 158 Fed. 649.

A carrier cannot make the owner of goods liable for the negligence of a connecting carrier.—*Sherman v. Hudson R. R. Co.*, 64 N. Y. 254, affg. s. c. 5 Daly (N. Y.), 521.

In the case of the carriage of property over two or more railroads constituting a connecting line, neither company is agent of the owner of the goods; each exercises an independent employment as a contractor with the owner.—*Sherman v. Hudson R. R. Co.*, 64 N. Y. 254, affg. s. c. 5 Daly (N. Y.), 521.

The duty of each intermediate carrier is to transport the goods safely to the end of its route, and deliver them to the next carrier on the route beyond.—*McDonald v. Western R. Co.*, 34 N. Y. 497.

As a general rule, the liability of a carrier terminates upon proper delivery to a connecting carrier.—*Isham v. Erie R. Co.*, 112 App. Div. (N. Y.) 612, 98 N. Y. Supp. 609; *McLendon v. Wabash R. Co.*, 119 Mo. App. 128, 95 S. W. 943.

Liability depends not upon the distance the goods are to be carried, the number of the carriers, or the marks upon the goods showing their ultimate destination, but upon the terms of the contract, and if by its terms the contract of the initial carrier covers all the lines between the point of shipment and the destination of the goods, then such carrier is liable for the faithful performance of duty by all the carriers, and each one is entitled to such exemption as is contained in the contract of carriage. But where the first carrier only contracts to carry to and deliver to another carrier, such connecting carrier is not entitled to any exemptions by virtue of that contract of carriage, and the fact that it was known at the time of shipment that the goods would go over different lines does not change the liability of the carrier unless it stipulate therefor.—*Robinson v. N. Y. & T. Ss. Co.*, 63 App. Div. (N. Y.) 211, 71 N. Y. Supp. 424.

That a clerk of the initial carrier stated to a shipper that the goods would be sent to their destination is not evidence of a special contract to transport the goods beyond the company's own lines.—*Weis v. St. L. & S. F. R. Co.*, 97 N. Y. Supp. 993.

The receipt of goods marked for a destination beyond the terminus of the receiving carrier's line, without an express undertaking to deliver at that point, creates no liability on the initial carrier except to carry to its terminus and deliver to the connecting carrier.—*McLagan v. Ch. & W. R. Co.*, 116 Iowa, 183, 89 N. W. 233.

[15] Limitation of liability on through shipments.

Effect of limitation by initial carrier to transportation within the state upon interstate character of shipment,—see ante, § 25, note [2].

If the carrier's contract is to transport the freight over its own route, and to deliver it to another carrier, the fact that the contract stipulates the charge for the entire distance does not make it a through contract, so as to entitle succeeding carriers to the benefit of the limitations of liability therein contained.—*Aetna Ins. Co. v. Wheeler*, 49 N. Y. 616, affg. s. c. 5 Lans. (N. Y.) 480.

A stipulation in the contract that the carrier is not to be liable after the property is ready for delivery to the next carrier or to the consignee,

does not relieve the carrier from liability for goods withheld in transit and injured by its negligence.—*Isham v. Erie R. Co.*, 112 App. Div. (N. Y.) 612, 98 N. Y. Supp. 609.

A stipulation in bill of lading of an initial carrier limiting its liability to its own lines, is valid.—*American Hay Co. v. Bath & H. R. Co.*, 85 N. Y. Supp. 341.

Where goods are billed beyond the line of the initial carrier, it may, by express contract, limit its liability to its own line.—*Chicago & N. W. R. Co. v. Montfort*, 60 Ill. 175; *Richmond & D. R. Co. v. Shomo*, 90 Ga. 496, 16 S. E. 220; *Central R. & B. Co. v. Avant*, 80 Ga. 195, 5 S. E. 78.

If the initial carrier contracts to carry freight to its ultimate destination, it cannot limit its liability for the negligence of the connecting carrier.—*Buffington v. Wabash R. Co.*, 118 Mo. App. 476, 94 S. W. 991.

Where a carrier receives goods for shipment beyond its own line, notwithstanding provisions of the bill of lading to the contrary, it becomes liable for the transportation of the goods through to its destination, and the connecting lines become its agents, for whose faults it becomes responsible to the owner of the goods.—*Virginia Coal Co. v. L. & N. R. Co.*, 98 Va. 776, 37 S. E. 310.

[16] Failure to deliver as evidence of negligence.

The failure of the carrier to deliver a shipment or any part thereof to the consignee at the place of destination is *prima facie* evidence of negligence.—*Canfield v. B. & O. R. Co.*, 93 N. Y. 532, revg. s. c. 48 N. Y. Super. 550.

[17] Exemption from and limitation of liability—In general.

Limitation of liability on through shipments.—see ante, note [15].

Whether provisions will be construed as limiting liability for negligence.—see post, note [27].

Limitation of liability for loss of or injury to baggage.—see post, note [43].

Limitation of liability by underclassification.—see ante, § 34, note [3].

In the absence of any statute controlling the subject, any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility for loss or damage arising from the negligence of himself or his servants is void as against public policy, as attempting to put off the essential duties resting upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principle on which the law of common carriers was established, the securing of utmost care and diligence in the performance of their duties to the public.—*Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 18

Sup. Ct. R. (U. S.) 289, affg. 95 Iowa, 260, 63 N. W. 692; *Campania La Flecha v. Bramer*, 168 U. S. 104, 18 Sup. Ct. R. (U. S.) 12; *Liverpool & G. W. S. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. R. (U. S.) 469, affg. s. c. 22 Fed. 715, 17 Fed. 377; *Hart v. Pa. R. Co.*, 112 U. S. 331, 5 Sup. Ct. R. (U. S.) 151, affg. s. c. 7 Fed. 630; *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.

A carrier may limit its liability for losses except those occasioned by negligence or misconduct.—*York Co. v. Ill. Cent. R. Co.*, 3 Wall. (U. S.) 107, affg. s. c. Fed. Cases, No. 18,143; *Russell v. Erie R. Co.*, 70 N. J. L. 808, 59 Atl. 150, 67 L. R. A. 433; *Smith v. N. C. R. Co.*, 64 N. C. 235; *U. S. Exp. Co. v. Backman*, 28 Oh. St. 144.

A carrier may refuse to transport a circus train except upon a special contract limiting its liability.—*Wilson v. Atlantic C. L. R. Co.*, 129 Fed. 774; affd. 133 Fed. 1022.

A carrier cannot limit its common law liability to the extent of exemption from loss of or injury to goods through its negligence.—*Thomas v. Wabash, St. L. & P. R. Co.*, 63 Fed. 200; affd. 71 Fed. 481; *McFadden v. Mo. Pac. R. Co.*, 92 Mo. 343, 4 S. W. 689; *Paul v. Pa. R. Co.*, 70 N. J. L. 442, 57 Atl. 139; *Goldey v. Pa. R. Co.*, 30 Pa. 242.

To permit carriers to fix a limitation to the amount of their liabilities for negligence is, in effect, to permit them to exempt themselves from such liability.—*Steamboat City of Norwich*, 4 Ben. (U. S.) 271.

Even though transportation is, under the special contract, "at the owner's risk," the carrier is liable for his failure to use reasonable care and prudence.—*Canfield v. B. & O. R. Co.*, 93 N. Y. 532, revg. s. c. 48 N. Y. Super. 550.

In consideration of a reduced fare, a carrier may exempt itself from liability for loss by negligence.—*Bissell v. N. Y. C. R. Co.*, 25 N. Y. 442, revg. s. c. 29 Barb. (N. Y.) 602.

A carrier can not contract for exemption from liability for injuries or damages resulting from negligence, wilful default or tort of himself or servants.—*Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486.

A carrier cannot limit its common liability except with the express assent of the shipper.—*Carpenter v. B. & O. R. Co.*, — Pen. (Del.) — 64 Atl. 252.

A carrier cannot limit its liability for loss resulting from its gross negligence.—*Chicago & N. W. R. Co. v. Chapman*, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508.

A common carrier cannot contract against liability for its negligence.—*Fulbright v. Wabash R. Co.*, 118 Mo. App. 482, 94 S. W. 992; *Griffin v. Wabash R. Co.*, 115 Mo. App. 549, 91 S. W. 1015; *George v. Ch. R. I. & P. R. Co.*, 57 Mo. App. 358.

The carrier may restrict its common law liability for losses resulting from its negligence.—*Ficklin v. Wabash R. Co.*, 117 Mo. App. 211, 93 S. W. 861.

A stipulation for exemption of a carrier from liability for damage caused by its negligence is void and against public policy.—*Potts v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 394; *McConnell Bros. v. So. R. Co.*, 144 N. C. 87, 56 S. E. 559; *Ullman v. Ch. & N. W. R. Co.*, 112 Wis. 150, 88 N. W. 41, 56 L. R. A. 246; *Ullman v. Ch. & N. W. R. Co.*, 112 Wis. 168, 88 N. W. 1103.

While a carrier may not lawfully contract to exempt itself from liability for the consequences of its own negligence, it may contract to limit the amount in which it shall be liable for damage resulting from such cause.—*Richmond & D. R. Co. v. Payne*, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849n.

A carrier cannot, by any agreement, however plain and explicit, wholly relieve itself from liability for injuries resulting from its gross negligence or fraud.—*Abrams v. Milwaukee, L. S. & W. R. Co.*, 87 Wis. 485, 58 N. W. 780.

[18] — By special contract.

A carrier may, by special contract, limit its liability except for injuries or damage caused by negligence.—*Arthur v. Tex. & P. R. Co.*, 204 U. S. 505, 27 Sup. Ct. R. (U. S.) 338; *Cau v. Tex. & P. R. Co.*, 194 U. S. 427, 24 Sup. Ct. R. (U. S.) 663.

Special contracts between carriers and shippers limiting the carrier's liability are upheld where the terms are just and reasonable and not contrary to public policy, but the law will not allow contracts which amount to an abandonment by the carrier of its obligations to the public.—*Liverpool & G. W. S. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. R. (U. S.) 469, affg. s. c. 22 Fed. 715, 17 Fed. 377.

Under a statute of Illinois providing that a carrier can not lawfully limit its common law liability for the safe carriage of property, by any limitation in the receipt given for such property, a special contract, which, in consideration of the extending of a lower rate for shipment to the consignor, limited the liability of the carrier, is valid and binding on the shipper.—*Jennings v. Smith*, 99 Fed. 189.

The carrier may limit its responsibility by special contract with the shipper within certain limits.—*Leitch v. Union R. Transp. Co.*, Fed. Cases, No. 8224.

A contract limiting a carrier's liability, in consideration of reduced rates, is binding.—*Zimmer v. N. Y. C. & H. R. R. Co.*, 137 N. Y. 460, 33 N. E. 642, affg. s. c. 62 Hun (N. Y.), 619, 16 N. Y. Supp. 631; *Hill v. Boston, H. T. & W. R. Co.*, 144 Mass. 284, 10 N. E. 836.

A contract between the carrier and shipper will not be interpreted as limiting the former's liability unless it clearly and unmistakably does so.—*Nicholas v. N. Y. C. & H. R. R. Co.*, 89 N. Y. 370.

The rule that a carrier may, by express contract, exempt itself from liability for negligence will not be considered as overthrown or affected in this state by the decision of the United States Supreme Court (*Railroad Co. v. Lockwood*, 17 Wall. 357) to the contrary.—*Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180, revg. s. c. 7 Hun (N. Y.), 399, distinguishing, *Cragin v. N. Y. C. R. Co.*, 51 N. Y. 61.

A common carrier may, by express contract, limit its common law liability.—*Belger v. Dinsmore*, 51 N. Y. 166, revg. s. c. 51 Barb. (N. Y.) 69, 34 How. Pr. (N. Y.) 421; *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485; *Steiger v. Erie R. Co.*, 5 Hun (N. Y.), 345; *Moore v. Evans*, 14 Barb. (N. Y.) 524, overruling *Gould v. Hill*, 2 Hill (N. Y.), 623; *Mercantile Mutual Ins. Co. v. Chase*, 1 E. D. Smith (N. Y.), 115.

While carriers may contract for exemptions from common law liability, it must be done in clear and unambiguous terms, and the rule that the language of contracts, if ambiguous, is to be construed against the party using it should be rigidly applied to such contracts.—*Edsall v. Camden & A. R. & T. Co.*, 50 N. Y. 661.

If the shipper pays the rate legally established, an agreement exempting the carrier from liability, in whole or part, is without consideration.—*Bissell v. N. Y. C. R. Co.*, 25 N. Y. 442, revg. s. c. 29 Barb. (N. Y.) 602.

A carrier may by special contract fix a sum beyond which it will not be liable for a loss upon a shipment.—*Jones v. N. Y. L. E. & W. R. Co.*, 3 App. Div. (N. Y.) 341, 38 N. Y. Supp. 284; *Brown v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 568.

A carrier may by special contract limit its liability except from loss occasioned by its fraud or negligence.—*Parsons v. Monteath*, 13 Barb. (N. Y.) 353.

Carriers may by special contract relieve themselves from liability for loss occasioned by the negligence, misconduct, fraud or felony of their employees or servants.—*Heineman v. Grand Trunk R. Co.*, 31 How. Pr. (N. Y.) 430; *Knell v. U. S. & B. Ss. Co.*, 33 N. Y. Super. 423.

Carriers cannot by contract exempt themselves from liability for their own fraud, or their own wilful act or wanton negligence.—*Heineman v. Grand Trunk R. Co.*, 31 How. Pr. (N. Y.) 430.

Carriers may limit their liability for negligence in almost any respect by express contract.—*Lee v. Marsh*, 28 How. Pr. (N. Y.) 275, 43 Barb. (N. Y.) 102.

A carrier cannot limit its liability for negligence, but may by special contract with the shipper reasonably restrict his common law liability in other respects. Whether such a special contract is reasonable is a question for the court to determine from all the circumstances of each case.—*South & N. A. R. Co. v. Henlein*, 52 Ala. 606.

No contract in limitation of a carrier's liability can exempt it from loss or damage resulting from its own negligence.—*Steele v. Townsend*, 37 Ala. 247; *Peerless Mfg. Co. v. N. Y. N. H. & H. R. Co.*, 73 N. H. 328, 61 Atl. 511; *Louisville, N. A. & C. R. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93.

A bill of lading, given by the carrier on receipt of the goods, and accepted by the shipper, is a "special contract" between the parties.—*Steele v. Townsend*, 37 Ala. 247.

Under a statute of Illinois providing that a carrier cannot limit its common law liability to safely deliver goods "by any stipulation or limitation in the receipt given for such property," a carrier may by special contract limit its liability for loss not attributable to its negligence or that of its servants.—*Chicago & N. W. R. Co. v. Chapman*, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508.

Carriers may, by special contract, relieve themselves from their general liability except for injuries or loss caused by negligence.—*Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88; *Illinois Cent. R. Co. v. Smyser*, 38 Ill. 355; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304.

A carrier may, by special contract limit its liability against all risks but its own negligence or misconduct.—*Squire v. N. Y. C. R. Co.*, 98 Mass 239; *Christenson v. Am. Exp. Co.*, 15 Minn. 270; *Cincinnati, H. & D. R. Co. v. Berdan*, 22 Oh. C. C. 326.

Neither notice nor special agreement can be permitted to restrict the common law liability of the carrier.—*Jones v. Voorhees*, 10 Oh. 145.

Where special rates are given in a contract restricting the carrier's liability, the want of consideration for the restriction must be affirmatively proved by the party seeking to avoid the restriction.—*Schaller v. Ch. & N. W. R. Co.*, 97 Wis. 31, 71 N. W. 1042.

A common carrier cannot, by any contract, however explicit, relieve itself from liability for injury resulting from its gross negligence or fraud.—*Black v. Goodrich Co.*, 55 Wis. 319, 13 N. W. 244.

[19] — By stipulation in bill of lading.

The shipper may consent to a just and reasonable stipulation in the bill of lading exempting the carrier from its common law liability, and a contract for exemption from liability for damages by fire is not unjust or unreasonable.—*Cau v. Tex. & P. R. Co.*, 194 U. S. 427, 24 Sup. Ct. R. (U. S.) 663.

A common carrier cannot divest itself of its common law liability as such, not even by exceptions in the bill of lading.—*Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174, revg. s. c. Fed. Cases, No. 889.

A contract by bill of lading, by which the liability of a carrier for loss of goods in shipment is limited to an agreed value per hundred pounds, in consideration of a reduced rate given the shipper, is valid.—*Missouri, K. & T. R. Co. v. Patrick*, 144 Fed. 632.

A carrier cannot limit its liability by a stipulation not known to the shipper, nor expressly or impliedly assented to by him.—*Baltimore & O. R. Co. v. Doyle*, 142 Fed. 669.

A stipulation in a bill of lading that "the ship-owner is not to be liable for any damage to the goods * * * in any case for more than the invoice or declared value of the goods, whichever shall be the least," is reasonable.—*The Lydian Monarch*, 23 Fed. 298; *The Hadji*, 18 Fed. 459; affd. 20 Fed. 875.

If the consignor, before shipment, accepts from the carrier, without objection, a bill of lading, he is chargeable with notice of its contents and is bound by its terms.—*Hill v. Syracuse, B. & N. Y. R. Co.*, 73 N. Y. 351, revg. s. c. 8 Hun (N. Y.), 296, distinguishing *Bostwick v. B. & O. R. Co.*, 45 N. Y. 712.

Where a bill of lading contains a clause exempting the carrier from loss by fire, there is no liability for such loss, unless occasioned by the negligence of the carrier.—*Germania Ins. Co. v. Memphis & C. R. R. Co.*, 72 N. Y. 90, affg. s. c. 7 Hun (N. Y.), 233.

In the absence of proof of fraud, concealment or improper practice, it will be presumed that the limitation of a carrier's common-law liability, in a receipt for freight, was known and assented to by the party receiving it, whether such limitation is from loss from specified causes, or to a fixed amount stated as the value of the property.—*Belger v. Dinsmore*, 51 N. Y. 166, revg. s. c. 51 Barb. (N. Y.), 69, 34 How. Pr. (N. Y.), 421.

Unless a special consideration is recited therefor, a provision in the contract of shipment that the damages for delay or injury, shall be measured by the market value at the place of shipment, instead of the place of delivery, is invalid.—*St. Louis, I. M. & S. R. Co. v. Marshall*, 74 Ark. 597, 86 S. W. 802; *St. Louis, I. M. & S. R. Co. v. Coolidge*, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555.

A clause in a receipt or bill of lading exempting a carrier from a common-law liability is not binding on the shipper unless it appears that he knew of and assented to the exemption, and this is a question of fact, to be determined on the trial.—*Merchants' D. Transp. Co. v. Thielbar*, 86 Ill. 71.

In a bill of lading under which the freight paid was \$330, and the value of the goods \$2,000, the shipper agreed to limit the carrier's liability to \$50.—*Held*, that in the absence of an affirmative showing that this limitation was reasonable, it is void.—*Murphy v. Wells Fargo & Co.*, 99 Minn. 230, 108 N. W. 1070.

A provision in a contract of carriage, limiting the carrier's liability to a specified amount, is against public policy.—*Southern Exp. Co. v. Rothenberg*, 87 Miss. 656, 40 So. 65.

A proviso of a bill of lading exempting the carrier from liability for all loss by fire is valid if a consideration is allowed the shipper for the exemption.—*Scott Co. v. St. L. I. M. & S. R. Co.*, — Mo. App.—, 104 S. W. 924.

Where a contract of shipment does not set forth an agreed valuation of the property, and the limitation as to value is merely as to the amount of recovery for damages caused by the carrier's negligence, the contract is invalid as an attempt by the carrier to relieve itself from liability for negligence.—*Abrams v. Milwaukee L. S. & W. R. Co.*, 87 Wis. 485, 58 N. W. 780.

[20] — By general notice.

Limitation of liability as to baggage by general notice,—see post, note [43].

The carrier's common-law liability cannot be limited by a general notice.—*Kirkland v. Dinsmore*, 62 N. Y. 171, revg. s. c. 2 Hun (N. Y.), 46.

A notice, even though brought to the knowledge of the shipper, will not suffice to limit the common-law liability of the carrier, which can be done only by express contract.—*Blossom v. Dodd*, 43 N. Y. 264; *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485; *Bissell v. N. Y. C. R. Co.*, 25 N. Y. 442; *French v. Buffalo, N. Y. & E. R. Co.*, 4 Keyes (N. Y.), 108.

A carrier may not limit its liability by a general notice but may by special contract.—*Steele v. Townsend*, 37 Ala. 247.

Neither notice nor special agreement can be permitted to restrict the common-law liability of the carrier.—*Jones v. Voorhees*, 10 Oh. 145.

[21] — Agreed valuations or liquidated damages.

Effect of undervaluation or failure to disclose real value of goods,—see post, note [26].

The limitation of a carrier's liability for loss of goods to an agreed value per hundred pounds, in consideration of a reduced rate given the shipper, is valid.—*Missouri, K. & T. R. Co. v. Patrick*, 144 Fed. 632.

A receipt issued by a carrier which states that it is "agreed that the liability of Monahan's Express will not exceed \$50 unless a greater value is stated or receipted for," in no way relieves the carrier from its own negligence.—*Blum v. Monahan*, 36 Misc. (N. Y.) 179, 73 N. Y. Supp. 162.

A receipt for goods provided that "In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding \$50, unless a greater value is declared, the shipper agrees that the value of said property is not more than \$50, unless a greater value is stated herein, and that the company shall not be liable * * * for more than \$50, if no value is stated herein."—*Held*, that the shipper was estopped from asserting that the property was worth more than the sum stated. *Bates v. Weir*, 121 App. Div. (N. Y.) 275, 105 N. Y. Supp. 785.

A bill of lading contained the following provision: "nor, in any event, shall the holder hereof demand beyond the sum of \$50, at which the article forwarded is hereby valued, unless otherwise expressed." The shipper was familiar with the terms of similar receipts.—*Held*, that there could be no recovery in excess of \$50, even though there was negligence on the part of the carrier.—*Ghormley v. Dinsmore*, 53 N. Y. Super. 36, revg. s. c. 51 N. Y. Super. 196.

Limitation of liability for loss of a carload of mules, to \$100, is reasonable, where the shipper got reduced rates.—*Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649.

The bill of lading gave \$100 as the value of a mare. The shipper as plaintiff showed she was worth \$2,000.—*Held*, he could recover only \$100.—*Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870.

There is a distinction between shipping property on an agreed valuation and shipping it under an agreement that in case of loss "the amount claimed should not exceed" a given sum. The Kentucky rule is that an agreement of the latter sort does not prevent full recovery where the loss results from negligence.—*Louisville & N. R. Co. v. Owen*, 93 Ky. 201, 14 Ky. L. R. 118, 19 S. W. 590.

Limitation of recovery for loss to an agreed valuation, which represents a fair average value of the loss of property, will be sustained, though the loss was due to the carrier's negligence.—*Alair v. No. Pac. R. Co.*, 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764.

If a contract of shipment is governed by the posted schedules as to rates, but declares that the value of the shipment does not exceed a stated amount, the shipper is not estopped by this declaration of value, which is void because without consideration.—*Kellerman v. Kansas City, St. J. & C. B. R. Co.*, 136 Mo. 177, 34 S. W. 41.

Common carriers cannot, as liquidated damages, where it is understood by the parties that the sum agreed upon is less than the value of the goods, determine in advance the *quantum* of damages for loss occasioned by negligence.—*U. S. Exp. Co. v. Backman*, 28 Oh. St. 144.

Where, for a special consideration, a shipper consents to a limitation of carriers' liability to a liquidated amount, the sum so agreed upon is the maximum amount recoverable only in case of loss through some other cause than negligence.—*U. S. Exp. Co. v. Backman*, 28 Oh. St. 144.

A stipulation in a bill of lading fixing the value of the property is valid if fair and reasonable in itself, based on a sufficient consideration, freely and understandingly acquiesced in by shipper, even though such values are much less than the actual values.—*Starnes v. R. Co.*, 91 Tenn. 516, 19 S. W. 675.

A carrier cannot by contract exempt itself from liability for the consequences of its negligence, but it is proper to fix in the contract the agreed value of the property shipped beyond which value the carrier shall not be liable.—*Louisville & N. R. Co. v. Sowell*, 90 Tenn. 17, 15 S. W. 837.

An agreement between a carrier and a shipper, liquidating loss or damage by negligence in advance upon an actual or maximum basis fairly agreed upon and stated in the contract, is valid.—*Ullman v. Ch. & N. W. R. Co.*, 112 Wis. 150, 88 N. W. 41, 56 L. R. A. 246; *Ullman v. Ch. & N. W. R. Co.*, 112 Wis. 168, 88 N. W. 1103.

A contract between a carrier and shipper limiting the liability of the former for loss or damage to the subject of carriage to an arbitrary sum of money not fixed with reference to the agreed actual or maximum value of the property is not a lawful limitation of liability.—*Ullman v. Ch. & N. W. R. Co.*, 112 Wis. 150, 88 N. W. 41, 56 L. R. A. 246.

If a shipper accepts a bill of lading liquidating the damages for loss at a specified sum, he thereby assents to the terms thereof as to such value.—*Ullman v. Ch. & N. W. R. Co.*, 112 Wis. 150, 88 N. W. 41, 56 L. R. A. 246.

Express provisions in a contract of carriage by which the carrier assumes liability only to the extent of an agreed valuation are valid, even though the loss or damage be through the negligence of the carrier.—*Loeser v. Ch. M. & St. P. R. Co.*, 94 Wis. 571, 69 N. W. 372.

[22] — Time for presentation of claim.

A stipulation by an express company that it will not be liable for any loss of a package, unless the claim is presented within 90 days, is valid, where the time required for transit is short.—*Express Co. v. Caldwell*, 21 Wall (U. S.), 264.

A carrier may stipulate in the bill of lading a reasonable time within which notice of claim for loss or damage shall be presented, and the manner of giving it, as a condition of liability. If such time is not reasonable as applied to a given case, however, it will not bar recovery.—*Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 28 N. E. 394, affg. s. c. 52 Hun (N. Y.), 227, 5 N. Y. Supp. 140.

[23] — Power of commission.

Authority to a corporation commission to make just and reasonable rates for freight, gives no power to change the law, and it is beyond the power of the commission to permit carriers to limit their liability for loss caused by negligence, to a certain fixed amount.—*Everett v. Norfolk & S. R. Co.*, 138 N. C. 68, 50 S. E. 557.

[24] — Effect on rule of damages.

That in consideration of the shippers agreeing to a limitation of the carrier's liability wholly, or to a given amount, the carrier transported the goods at a specially reduced rate, does not alter or affect the rule of damages for loss.—*U. S. Exp. Co. v. Backman*, 28 Oh. St. 144.

[25] — Limitation must be pleaded.

The limitation on a carrier's liability contained in a receipt or bill of lading, is not in the nature of a condition precedent to the shipper's right to recover, but must be pleaded in the answer to be taken advantage of.—*Westcott v. Fargo*, 61 N. Y. 542.

[26] Effect of undervaluation or failure to disclose real value.

If the freight is of unusual value, a stipulation that the carrier will not be liable for loss unless the true nature and value of the property be disclosed and extra freight paid, will operate to exempt the carrier from liability even for its own negligence, unless the stipulation was complied with.—*Rathbone v. N. Y. C. & H. R. R. Co.*, 140 N. Y. 48, 35 N. E. 418, revg. s. c. 23 N. Y. Supp. 1148.

The receipt given by a carrier provided that "If the value of the property above described is not stated by the shipper, the holder hereof will not demand of the Adams Express Company a sum exceeding \$50" for the loss of or injury to the goods. The goods were never delivered to the consignees. The goods were of a value in excess of \$50, but the shipper failed to state the fact to the carrier.—*Held*, that the omission of the shipper to state or disclose the value of the property was a fraud upon the carrier, exempting the latter from liability in excess of the limitations of the contract.—*Magnin v. Dinsmore*, 70 N. Y. 410.

At common law, a shipper who falsely undervalues his goods cannot, if they are lost in the hands of the carrier, recover from the latter their

full value.—*Barnes v. L. I. R. Co.*, 115 App. Div. (N. Y.) 44, 100 N. Y. Supp. 593, revg. s. c. 47 Misc. 313, 93 N. Y. Supp. 616.

[27] Whether provisions will be construed as limitation of liability for negligence.

General words in the contract between shipper and carrier, limiting the latter's liability, will not be construed as exempting it from liability for negligence, if they are capable of any other construction.—*Kenney v. N. Y. C. & H. R. R. Co.*, 125 N. Y. 422, 26 N. E. 626.

A stipulation in a bill of lading limiting the carrier's liability will not be held to exempt it from negligence unless it expressly so states.—*Westcott v. Fargo*, 61 N. Y. 542.

A clause releasing a carrier "from damage or loss to any article from or by fire or explosion of any kind," does not release it from liability for damage by those means, resulting from his own negligence.—*Steinweg v. Erie R. Co.*, 43 N. Y. 123.

A stipulation in the bill of lading that the carrier will not be responsible for delay in transit will not exempt it from liability for delay occasioned by negligence. Such an exemption must be expressly stated in the contract.—*Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 28 N. E. 394, affg. s. c. 52 Hun (N. Y.), 227, 5 N. Y. Supp. 140.

[28] Burden of proof.

The burden is on the shipper, where the contract exempts carrier from liability for loss by fire, to show that the fire was due to the carrier's negligence, whereupon the carrier is liable in spite of the exemption.—*Lamb v. Camden & A. R. Co.*, 46 N. Y. 271.

If the carrier's liability is limited by special agreement, the burden of proving that the loss was occasioned by want of due care, rests upon the plaintiff, and he cannot rely on absence of proof of diligence, as proof of negligence.—*French v. Buffalo, N. Y. & E. R. Co.*, 4 Keyes (N. Y.), 108.

If the carrier admits receiving goods, which he never delivered, it devolves on him to show that their loss occurred through no negligence or fault on his part.—*Blum v. Monahan*, 36 Misc. (N. Y.) 179, 73 N. Y. Supp. 162.

The burden is on the shipper to show facts taking the case out of the operation of the exemption clause.—*Sejalon v. Woolverton*, 31 Misc. (N. Y.) 752, 64 N. Y. Supp. 48; *Whitworth v. Erie R. Co.*, 87 N. Y. 413, affg. s. c. 45 N. Y. Super. 602; *Canfield v. B. & O. R. Co.*, 93 N. Y. 532, revg. s. c. 48 N. Y. Super. 550.

After plaintiff proves injury to his goods, the burden is on the carrier to show that it did not result from negligence and that it was within

one of the specified exceptions in the bill of lading.—*Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649.

The burden of proof is on the carrier to show that the loss resulted from one of the causes excepted in the bill of lading or special contract.—*Western Transp. Co. v. Newhall*, 24 Ill. 466.

Where a common carrier claims immunity for the loss of goods with which he has been entrusted, on the ground that such immunity is secured by special agreement, the burden is on him to prove that the loss was occasioned without his fault.—*Union Exp. Co. v. Graham*, 26 Oh. St. 595.

[29] Delay in transportation—Duty and liability of carriers.

Delay as discrimination,—see ante, § 32, note [11].

Preference in forwarding shipments of perishable property not unjust discrimination.—see ante, § 32, note [14].

A carrier is answerable for any delay beyond the time ordinarily required for transportation by the kind of conveyances used.—*Tierney v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 305, affg. s. c. 10 Hun (N. Y.), 569.

A common carrier must not only transport goods offered, but also deliver or offer to deliver them to the consignee, within a reasonable time.—*Sherman v. Hudson R. R. Co.*, 64 N. Y. 254, affg. s. c. 5 Daly (N. Y.), 521.

In the absence of express stipulation, a common carrier is bound to transport merchandise within a reasonable time.—*Ward v. N. Y. C. R. Co.*, 47 N. Y. 29; *Harby v. So. R. Co.*, 75 S. C. 321, 55 S. E. 760.

A railroad is liable for damages resulting from delay in transporting freight owing to a sudden strike on its lines.—*Blackstock v. N. Y. & E. R. Co.*, 20 N. Y. 48, affg. s. c. 1 Bosw. (N. Y.) 77.

The through way bill is the history of the transit of the freight made up for both railroad companies governing the transit and defining the rights of the connecting corporations with reference to the shipment, and upon its receipt by the connecting carrier, it being at the place of connection and subject to the control of such carrier, the duty is imposed on them to receive and transport the freight within a reasonable time, considering its character, to the place of destination.—*Cartwright v. Rome, W. & O. R. Co.*, 85 Hun (N. Y.), 517, 33 N. Y. Supp. 147.

The duty of a carrier to deliver goods within a reasonable time is not absolute, but merely relative, depending on the particular circumstances.—*Conger v. Hudson R. R. Co.*, 6 Duer (N. Y.), 375.

A carrier is under obligation to receive and transport passengers and freight in a reasonable prompt, safe and convenient manner.—*State v. Atlantic C. L. R. Co.*, — Fla. —, 44 So. 213.

Where the carrier agrees in the bill of lading to deliver goods at a specified time, he becomes an insurer of their delivery at that time, but is liable only for consequential damage for failure to deliver at the time specified.—*Clark v. Am. Exp. Co.*, 130 Iowa, 254, 106 N. W. 642.

A common carrier is bound by the common law to convey goods committed to it for that purpose within a reasonable time, and on failure, is liable in damages. The legislature has a right to impose penalties to enforce this admitted duty.—*Branch v. Wilmington & W. R. Co.*, 77 N. C. 347.

For losses, expenses, or other damage arising from mere delay, occasioned by a temporary excess of business, and without fault, the carrier is not liable.—*Thayer v. Burchard*, 99 Mass. 508.

In a suit for damages for delay in shipment, connecting carriers are not liable for damages resulting from improper routing by the initial carrier.—*Houston & T. C. R. Co. v. Buchanan*, 11 Tex. Ct. R. 1004, 84 S. W. 1073.

[30] — What constitutes unreasonable delay.

Delay due to unprecedented rush of business justifiable,—see ante, § 37, note [8].

A delay of nearly two days beyond the usual time of transportation of perishable goods has been held to be an unreasonable delay.—*Frey v. N. Y. C. & H. R. R. Co.*, 114 App. Div. (N. Y.) 747, 100 N. Y. Supp. 225.

Where goods were offered to a steamship company for carriage and the first ship to sail was at the time full, or the goods could not be loaded before time to sail, the company may send them on the next vessel sailing.—*Fowler v. Liverpool & G. W. S. Co.*, 23 Hun (N. Y.), 196; *affd.* 87 N. Y. 190.

Where goods were shipped from New York City to Denver, Colo., on July 2, evidence showing that on July 10 they had not been delivered at Denver is not sufficient to show unreasonable delay in transit.—*Brooks v. D. L. & W. R. Co.*, 86 N. Y. Supp. 961.

Unreasonable delay in transportation defined.—*Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128; *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58.

The ordinary time for transporting freight between two points was from two to three days.—*Held*, that there was an unreasonable delay in transportation, where the shortest time in the delivery of 125 cars was six days and the average time for the delivery of the cars which were delivered at all was over thirty days.—*Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128.

There is an unreasonable delay where a month was consumed in transporting goods a distance of thirty-three miles.—*Chesapeake & O. R. Co. v. Saulsbury*, — Ky. —, 103 S. W. 254.

Evidence considered and held to sustain a verdict of damages for delay of freight.—*Hanson v. Pa. R. Co.*, 72 N. J. L. 407, 60 Atl. 1101.

A parol agreement to furnish cars, if broken, makes the carrier liable for delay, even if the bill of lading has not been signed.—*Texas P. R. Co. v. Nicholson*, 61 Tex. 491.

[31] — Validity of statutes relative to delay.

Whether a statute imposing a penalty for failure to ship freight within five days is a regulation of interstate commerce,—see ante, § 25, note [16].

An act imposing a penalty for failure or delay in the shipment of freight is valid.—*Lexington Grocery Co. v. So. R. Co.*, 136 N. C. 396, 48 S. E. 801.

A statute of North Carolina provided that it should be unlawful for any carrier to omit or neglect to transport goods within a reasonable time and provided a penalty for such failure. It further stated what would be considered a reasonable time.—*Held*, that the enactment of this statute was a valid exercise of police power.—*Stone v. Atlantic C. L. R. Co.*, 144 N. C. 220, 56 S. E. 932.

[32] — Burden of proof.

In an action to recover a penalty for delay in transportation of goods the burden of proof is on the plaintiff.—*Walker Bros. v. So. R. Co.*, 137 N. C. 163, 49 S. E. 84.

[33] — Military occupation as excuse.

Military control of a railroad is justification for its refusing to accept goods but not for delay in transporting them.—*Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128; *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58.

[34] — Time for forwarding shipments.

Forwarding goods out of order of receipt as unjust discrimination,—see ante, § 32, note [13].

Order in which goods should be forwarded by connecting carriers,—see ante, § 35, note [26].

A railroad has a reasonable time after the arrival of property and the offer of it for transportation, to set it in motion from the starting point, and what is a reasonable time must be determined from the circumstances of each case.—*Bouker v. L. I. R. Co.*, 89 Hun (N. Y.), 202, 35 N. Y. Supp. 23.

A carrier receiving perishable property for transportation has a common law obligation to forward it immediately to its destination.—*Cartwright v. Rome, W. & O. R. Co.*, 85 Hun (N. Y.), 517, 33 N. Y. Supp. 147.

All persons offering freight have an equal right to have the same transported in the order of their application.—*New Eng. Exp. Co. v. Me. C. R. Co.*, 57 Me. 188.

A carrier must accept and transport goods in the order in which they are tendered, and is liable for damages for every departure from this rule.—*Houston & T. C. R. Co. v. Smith*, 63 Tex. 322.

Cotton received on a platform wholly disconnected from the railway station but used for that purpose is "received at the warehouse or depot" of the carrier, within the meaning of a statute requiring goods to be forwarded in the order received.—*Hill v. St. Louis S. W. R. Co.*, 75 S. W. 874 (Tex.).

There is no invariable rule requiring freight to be forwarded in the order of its receipt, without regard to its character, condition, perishability, etc.—*Peet v. Ch. & N. W. R. Co.*, 20 Wis. 624.

[35] — Contracts.

Where a carrier has a duty to ship goods within a reasonable time, and the law limits such time to five days, an agreement to ship "at the company's convenience" would ordinarily be too indefinite to be held reasonable and valid. In an action to enforce the penalties for delay under a penal statute, however, the agreement will not be so held.—*Whitehead v. Wilmington & W. R. Co.*, 87 N. C. 255.

The rigid rule of the common law, for strict construction of contracts limiting the liability of carriers, will not be applied to a case involving a violation of a penal statute.—*Whitehead v. Wilmington & W. R. Co.*, 87 N. C. 255.

[36] — Effect of delay.

An unreasonable delay in the transportation of goods does not justify the shipper in refusing to receive the goods at their destination.—*Chesapeake & O. R. Co. v. Saulsbury*, — Ky. —, 103 S. W. 254.

[37] — Measure of damages.

In an action for damages for unreasonable delay in the delivery of goods, the measure of damages is the difference in the value of the goods at the time and place they ought to have been delivered, and at the time of their actual delivery.—*Sherman v. Hudson R. Co.*, 64 N. Y. 254, affg. s. c. 5 Daly (N. Y.), 521; *Ward v. N. Y. C. R. Co.*, 47 N. Y. 29; *Katz v. C. C. C. & St. L. R. Co.*, 46 Misc. (N. Y.) 259, 91 N. Y. Supp. 720;

Galena & C. U. R. Co. v. Rae, 18 Ill. 488; *Sangamon Co. v. Henry*, 14 Ill. 156; *Clark v. Am. Exp. Co.*, 130 Iowa, 254, 106 N. W. 642; *Inman v. St. L. S. W. R. Co.*, 14 Tex. Civ. App. 39, 37 S. W. 37; *Peet v. Ch. & N. W. R. Co.*, 20 Wis. 624.

In an action to recover for damage caused by delay in transporting live stock, a fall in the market between the time when the stock should have arrived and the time when it actually arrived is a proper element of damage.—*Kent v. Hudson R. R. Co.*, 22 Barb. (N. Y.) 278.

Damages from loss of market, due to an unexcused delay by carrier, are too speculative and contingent to be recoverable.—*Conger v. Duer*, 6 Duer (N. Y.), 375.

[38] Baggage—What are proper articles of baggage.

Penalties for injury to baggage,—see N. Y. R. R. L., § 45.

Right of carrier to grant special privileges as to the amount of free baggage which may be carried under mileage tickets,—see ante, § 33.

Power of Commission as to baggage,—see post, § 49, note [14].

Whether articles of wearing apparel in a particular case constitute baggage, for which the carrier is responsible as insurer, depends upon the inquiry whether they are such in quantity and value as passengers under like circumstances ordinarily carry for personal use when traveling.—*New York C. & H. R. R. Co. v. Fraloff*, 100 U. S. 24.

Jewelry carried by a traveler and not intended to be used during her journey cannot be considered as baggage.—*Bacon v. Pullman Co.*, 159 Fed. 1.

Passenger may recover for a reasonable amount of money carried in his baggage as such.—*Fairfax v. N. Y. C. & H. R. R. Co.*, 73 N. Y. 167, affg. s. c. 43 N. Y. Super 18; *Merrill v. Grinnell*, 30 N. Y. 594; *Texas & N. O. R. Co. v. Lawrence*, 15 Tex. Ct. R. 471, 95 S. W. 663.

Samples of merchandise carried by the passenger in a trunk, to assist him in selling goods, and money, apparently even for traveling expenses, are not baggage.—*Hawkins v. Hoffman*, 6 Hill (N. Y.), 586.

Money, except what may be carried for traveling expenses, is not a proper article of baggage.—*Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85.

A pair of duelling-pistols and a pocket-pistol are properly a part of the baggage of a traveler for the loss of which the carrier is liable.—*Woods v. Devin*, 13 Ill. 746.

The term "baggage" includes only those effects of the traveler required for his pleasure, convenience and necessity during the journey.—*Wilson v. Grand Trunk R. Co.*, 56 Me. 60.

[39] — Source of carrier's obligation as to baggage.

The sale of a ticket by a carrier of passengers obligates the carrier, without any specific agreement or separate compensation, to carry the passenger's baggage to a reasonable amount, and deliver it at its destination or the end of the route.—*Isaacson v. N. Y. C. & H. R. Co.*, 94 N. Y. 278, revg. s. c. 25 Hun (N. Y.), 340.

[40] — Nature of baggage check.

A baggage check is a mere receipt for goods delivered and is not the contract of carriage.—*Park v. So. R. Co.*, — S. C. —, 58 S. E. 931.

[41] — Liability of carrier for loss of or injury to baggage.

A carrier is responsible for a parcel, though ignorant of its contents, no matter how valuable, unless he has made a special acceptance.—*Stoneman v. Erie R. Co.*, 52 N. Y. 429.

The baggage of a passenger is under the same legal protection as goods entrusted to a common carrier.—*Merrill v. Grinnell*, 30 N. Y. 594.

As a common carrier a railroad is an insurer of baggage carried except against an act of God or of the public enemy.—*Williams v. Cent. R. Co. of N. J.*, 93 App. Div. (N. Y.) 582, 88 N. Y. Supp. 434; affd. 183 N. Y. 518, 76 N. E. 1116.

[42] — Liability for goods not properly baggage.

If the carrier knew or had notice of the character of the goods taken as baggage and still undertook to transport them, he is liable for their loss, though they are not traveler's baggage.—*Stoneman v. Erie R. Co.*, 52 N. Y. 429.

A railroad is liable for merchandise carried as baggage, if it knew it was such, and a limitation for loss of baggage to \$100, does not prevent recovery of the full value of merchandise so carried.—*Salisbury v. Central R. Co. of N. J.*, 99 App. Div. (N. Y.) 163, 90 N. Y. Supp. 1042; affd. without opinion, 184 N. Y. 597, 77 N. E. 1196.

An agreement in a passenger's passage ticket limiting the carrier's liability for loss of baggage to \$100 does not prevent recovery of full value for a sample trunk, plainly marked.—*Trimble v. N. Y. C. & H. R. R. Co.*, 39 App. Div. (N. Y.) 403, 57 N. Y. Supp. 437; affd. 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115.

[43] — Limitation of liability.

It is competent for carriers, by specific regulations, brought to the knowledge of passengers, which are reasonable and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage upon additional compensa-

tion, proportioned to the risk; and the carriers may require, as a condition precedent to any contract for transportation of baggage, information from the passenger as to its value.—*New York C. & H. R. R. Co. v. Fraloff*, 100 U. S. 24.

Where a passenger received for his baggage a metal check and a paper containing a written statement of exemption from liability, he was chargeable with notice of the contents of the paper, and by it the liability of the carrier was qualified to the extent stated in the paper.—*Hopkins v. Westcott*, 6 Blatch. (U. S.) 64, Fed. Cases No. 6,692.

The rule that in the absence of fraud, stipulations contained in a receipt limiting the carrier's liability are legally presumed to have been known and assented to by the person receiving it, applies to carriers of passengers with their baggage.—*Steers v. Liverpool N. Y. & P. Ss. Co.*, 57 N. Y. 1.

A notice by a carrier that it will not be responsible for injuries to or loss of baggage will not relieve the carrier from liability.—*Camden Transp. Co. v. Belknap*, 21 Wend. (N. Y.) 354.

A carrier cannot limit its liability as to baggage by a general notice.—*Cole v. Goodwin*, 19 Wend. (N. Y.) 251.

[44] — Actions.

Whether statutory remedy supersedes existing remedies,—see post, § 40, note [2].

When a passenger suing for loss of her baggage, introduces in evidence her receipt from the carrier, for the purpose of proving her case, she becomes bound by any limitation of liability therein contained.—*Springer v. Westcott*, 78 Hun (N. Y.), 365, 29 N. Y. Supp. 149.

§ 39. Continuous carriage **[and breakage of bulk]*.—No common carrier shall enter into or become a party to any combination, contract, agreement or understanding, written or oral, express or implied, to prevent by any arrangement or by change of arrangement of time schedule, by carriage in different cars or by any other means or device whatsoever the carriage of freight and property from being continuous from the place of shipment to the place of destination. No breakage of bulk, stoppage or interruption of carriage made by any common carrier shall prevent the carriage of freight and property from being treated as one continuous carriage from the place of shipment to the place of destination. Nor shall any such breakage of bulk, stoppage or interruption of carriage be made or permitted by any common car-

*Words in brackets not a part of section heading as enacted.

rier except it be done in good faith for a necessary purpose without intention to avoid or unnecessarily interrupt or delay, the continuous carriage of such freight or property or to evade any of the provisions of law, of this act or of an order of the commission.

For parallel provisions of Interstate Commerce Act,—see Interst. Com. Act, § 7, post, Appendix B.

Service and facilities shall be adequate and reasonable, generally,—see ante, § 26.

Undue prejudice and disadvantage, generally,—see ante, § 32.

Duty of carriers to interchange cars with connecting lines, generally,—see ante, § 35.

Liability of carrier for delay in transit, generally,—see ante, § 38.

Power of Commission to establish through routes and make reasonable regulations as to service, generally,—see post, § 49.

Power of Commission to order changes in time schedules, etc.,—see post, § 51.

Actions by aggrieved persons for loss or damage caused by unnecessary breakage of bulk, or interruptions of continuous carriage,—see post, § 40.

Penalties and forfeitures for unnecessary interruptions of continuous carriage,—see post, § 56.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Purpose of regulative acts,—see ante, § 1, note [32].

Who are common carriers,—see ante, § 2, notes [2]–[7].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

What constitutes “continuous carriage” defined.—*Inters. Com. Commission v. C. N. O. & T. P. R Co.*, 56 Fed. 925.

Carriers may not lawfully discriminate between shippers in the matter of continuous carriage without the breaking of bulk.—*Warren-Ehret Co. v. Cent. R. Co. of N. J.*, 8 Inters. Com. R. 598.

A carrier may not regard lighterage service, for avoidance of breakage of bulk, as part of the through transportation to more distant points and not to an intermediate point, the carriage to both places

being through and continuous.—*Warren-Ehret Co. v. Cent. R. Co. of N. J.*, 8 Inters. Com. R. 598.

The continuity of a carriage of goods is not broken by one or more carriers, members of a through line, charging local rates as their proportion of a through line.—*Board of Trade v. Ala. Mid. R. Co.*, 6 Inters. Com. R. 1.

A railroad company cannot require a connecting carrier to break bulk and reship, as a condition of carrying the latter's freight from such point of intersection.—*Hudson Valley R. Co. v. Boston & M. R. Co.*, 45 Misc. (N. Y.) 520, 92 N. Y. Supp. 928.

Allegations that the acts charged against defendant carrier were unlawful, in that it was purposely avoiding continuous passage of the goods, etc., do not make out a "contract, combination or agreement to prevent continuous carriage."—*Clark v. Am. Exp. Co.*, 130 Iowa, 254, 106 N. W. 642.

A statute of Iowa which provides that connecting carriers shall transfer carload lots of freight without unloading unless such unloading be done without charge therefor is not unconstitutional.—*Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436n.

A state statute requiring the breaking of bulk and preventing continuous carriage, etc., is unconstitutional.—*Council Bluffs v. K. C, St. J. & B. R. Co.*, 45 Iowa, 338.

A carrier may be required to make transfers of freight to a connecting carrier without breaking bulk.—*Louisville & N. R. Co. v. Central Stockyards Co.*, 30 Ky. L. R. 18, 77 S. W. 778.

§ 40. Liability for loss or damage caused by violation of this act; * [reasonable attorneys' fees taxable as costs].—In case a common carrier shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by any law of the state of New York, by this act or by an order of the commission, such common carrier shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom, and in case of recovery, if the court shall find that such act or omission was wilful, it may in its discretion fix a reasonable counsel or attorney's fee, which fee shall be taxed and

*Words in brackets not a part of section heading as enacted.—Ed.

collected as part of the costs in the case. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any such person or corporation.

For similar provisions of Interstate Commerce Act,—see Interst. Com. Act, § 8, post, Appendix B.

In any action to recover for damages by delay in transit, the burden of proof is on carrier to show that delay was not due to negligence,—see ante, § 38.

Complaints before the Commission as to violations of this act,—see post, § 48, subd. 2, §§ 71, 72.

Forfeitures and penalties which may be recovered in behalf of the public for violations of any provision of this Act,—see post, §§ 56, 58, 59.

Summary proceedings by commissions to enforce obligations imposed by this Act,—see post, §§ 57, 74.

Who are common carriers,—see ante, § 2, notes [2]–[7].

Actions to recover excessive charges,—see ante, § 26, notes [29]–[38].

Recovery of penalties by the aggrieved party,—see ante, § 26, notes [68]–[73].

Remedy of shipper for discontinuance of switch connections by carrier,—see ante, § 27, note [8].

Actions to recover for discrimination in rates and charges,—see ante, § 31, notes [81]–[88].

Restraining unlawful discriminations in rates,—see ante, § 31, note [82].

Actions by shipper unduly discriminated against in matters of facilities and service,—see ante, § 32, note [31].

Actions to recover for violations of long and short haul rule,—see ante, § 36, notes [37]–[41].

Actions for failure to furnish cars or for discrimination in furnishing the same,—see ante, § 37, notes [17]–[23].

Suits to enforce penalties for failure to file reports,—see post, § 46, note.

Actions to set aside unauthorized leases or agreements,—see post, § 54, note [11].

Recovery of excessive amount paid for gas,—see post, § 72, note [17].

[1] Right of action.

The lessor of a railroad is liable for damages resulting from its failure to see to it that its public duties are performed in the operation of its line

by a lessee.—*Independent Ref. Assn. v. W. N. Y. & P. R. Co.*, 6 Inters. Com. R. 378.

A railroad is liable civilly for the unlawful acts of its servants, in the prosecution of the business entrusted to them, if done in the course of the employment, even though a departure from their express or implied authority.—*Palmeri v. Manhattan R. Co.*, 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136.

Where trustees for mortgage bondholders of a railroad buy such road on foreclosure and conduct the business of the same for the benefit of the bondholders, they may be prosecuted in a court of law for any liability incurred, and are not in the same position as receivers appointed by the court.—*Rogers v. Wheeler*, 43 N. Y. 598, affg. s. c. 2 Lans. (N. Y.) 486.

[2] Whether statutory remedy supersedes existing remedies.

A statute will not be construed as taking away a common law right of action existing at the date of its enactment, unless the pre-existing right is so repugnant to the statute that its survival would in effect deprive the subsequent statute of its efficacy.—*Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. R. (U. S.) 350, revg. s. c. 12 Tex. Ct. R. 498, 85 S. W. 1052.

Remedies afforded by statute are cumulative and in addition to those existing at common law.—*Atchison, T. & S. F. R. Co. v. D. & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. R. (U. S.) 185, revg. 13 Fed. 546.

Under Interst. Com. Act, § 9, providing that any person claiming to be damaged by a violation of the Act, may make complaint to the Commission or bring suit to recover damages sustained, where a plaintiff pursues the former course, he is thereafter confined to the remedy provided by the Act.—*Western N. Y. & P. R. Co. v. Pa. Ref. Co.*, 137 Fed. 343.

The special remedies afforded by the Interstate Commerce Act were intended to supplement, and not to supplant, the existing remedies.—*Tift v. So. R. Co.*, 123 Fed. 789.

The shipper's common law right of action for extortionate charges was superseded by the statutory remedies.—*Winsor Coal Co. v. Ch. & A. R. Co.*, 52 Fed. 716.

The special remedies provided by the Interstate Commerce Act are cumulative.—*Little Rock & M. R. Co. v. E. Tenn. V. & G. R. Co.*, 47 Fed. 771; appeal dismissed, 159 U. S. 698, 16 Sup. Ct. R. (U. S.) 189.

The fact that a city ordinance provides a penalty for failure of a gas company to comply with the conditions of the ordinance, does not prevent an aggrieved party from maintaining an action in his own behalf to re-

cover for such damages as he may have suffered by reason of the wrongful act of the company.—*Indiana Gas Co. v. Anthony*, 26 Ind. App. 307, 58 N. E. 868.

A state may make the remedies afforded by its railroad commission act cumulative as against railroad corporations.—*Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607.

[3] Validity of provision allowing attorney's fees.

A statute allowing reasonable attorney's fees to the plaintiff in a certain class of actions against railroad companies held valid.—*Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. R. (U. S.) 609.

A provision in a Texas statute that in actions against railroad companies for labor, services, overcharges on freight, claims for stock killed or injured, etc., plaintiff may recover as costs in addition to his claim "all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed \$10, to be assessed and awarded by the court or jury in trying the issue," is unconstitutional, as operating to deprive the carriers of property without due process of law, and denying them equal protection of the laws, in that it singles them out of all citizens and corporations and requires them to pay in certain cases attorney's fees to the parties successfully suing them, while it gives them no like or corresponding benefit when the suit terminates favorably to them.—*Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. R. (U. S.) 255, revg. 87 Tex. 19, 26 S. W. 985; *South & N. Ala. R. Co. v. Morris*, 65 Ala. 193; *St. Louis, I. M. & S. R. Co. v. Williams*, 49 Ark. 492, 5 S. W. 883; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006; *Lafferty v. Ch. & W. M. R. Co.*, 71 Mich. 35, 38 N. W. 660; *Joliffe v. Brown*, 14 Wash. 155, 44 Pac. 149.

The Interstate Commerce Commission may not award the attorney's fee which the Interstate Commerce Act authorizes a court to award.—*Council v. Western & A. R. Co.*, 1 Inters. Com. R. 292, 355, 638, 1 I. C. C. R. 339.

A statute of Arkansas provided that for a charge by a railroad in excess of the maximum fixed by the act, the railroad should forfeit a certain sum, and costs of suit, including a reasonable attorney's fee.—*Held*, that the attorney's fee was a part of the penalty imposed for a violation of the act and the statute was not objectionable as being partial or unequal legislation.—*Dow v. Beidelman*, 49 Ark. 455, 5 S. W. 718; *affd.* 125 U. S. 680, 8 Sup. Ct. R. (U. S.) 1080.

A transportation statute allowing a reasonable attorney's fee to successful litigants against a carrier for violating the act is a valid police regulation, and also valid as in the nature of a penalty for non-com-

pliance with the statute.—*Peoria, D. & E. R. Co. v. Duggan*, 109 Ill. 537.

A statute provides that when recovery is had for its violation, attorney's fees may be adjudged against the defendant, is not unconstitutional as granting to one suitor a privilege which is withheld from other citizens, since all citizens having litigation of the character indicated have equal rights to recover attorney's fees.—*Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436n.

A statute providing that when recovery is had for its violation, attorney's fees are adjudged against the defendant is not open to the objection that it imposes a "penalty for exercising the right of defense" since, if the defense is established, no penalty is imposed.—*Burlington C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436n.

The provision in a transportation statute allowing an attorney's fee as part of the costs of a successful suit for violation of its provisions is constitutional.—*Missouri, K. & T. R. Co. v. Simonson*, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765; *Atchison, T. & S. F. R. Co. v. Matthews*, 58 Kan. 447, 49 Pac. 602; *affd.* 174 U. S. 96, 19 Sup. Ct. R. (U. S.) 609; *Missouri Pac. R. Co. v. Abney*, 30 Kan. 41, 1 Pac. 385; *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573; *Cohn v. St. Louis, I. M. & S. R. Co.*, 181 Mo. 30, 79 S. W. 961.

The extent of the litigation as well as the amount in controversy, is an important factor in determining the proper attorney's fee to be awarded. It must be a "reasonable fee" considering all the elements in the case affecting the proper amount of attorney's compensation.—*Missouri, F. S. & G. R. Co. v. Shirley*, 20 Kan. 660.

A statute allowing attorney's fees to the plaintiff upon recovery in certain actions against railroads, is unconstitutional as making unjust discriminations between classes of suitors and denying the railroads the equal protection of the law.—*Wilder v. Ch. & W. M. R. Co.*, 70 Mich. 382, 38 N. W. 289; *Schut v. Ch. & W. M. R. Co.*, 70 Mich. 433, 38 N. W. 291.

An Illinois statute provided that, "whenever an appeal shall be taken from the judgment of any court, in an action for damages, brought by any citizen of this state against any corporation, a reasonable attorney's fee for the appellee shall be assessed by the court or justice of the peace, as the case may be, to the appellate court, and upon affirmance of the judgment, a judgment for the amount so assessed shall be rendered in favor of the appellee and against the appellant," etc.—*Held*, that this provision is unconstitutional as denying to the corporations the equal protection of the law.—*Chicago, St. L. & N. O. R. Co. v. Moss & Co.*, 60 Miss. 641.

[4] Statutes allowing recovery of punitive damages.

A statute of Iowa, providing that a railway which fails to fence its road against live stock shall be liable for double the value of stock killed or damages caused thereto, by reason of its failure to so fence, is not denying to the company the equal protection of the law in violation of U. S. Constitution, 14 Amendment.—*Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. R. (U. S.) 207.

A statute giving to anyone who is charged excessive fares by a railroad company the right to recover the excess and \$50 in addition is penal.—*Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 644.

A statute making certain acts unlawful on the part of a common carrier and permitting a person injured by a violation thereof to recover treble the injuries sustained has for its purpose punishment, not indemnity.—*Langdon v. N. Y. L. E. & W. R. Co.*, 58 Hun (N. Y.), 122, 11 N. Y. Supp. 514, affg. 9 N. Y. Supp. 245.

An act allowing double damages to plaintiffs recovering in a certain class of actions against railroads, in so far as it gives additional damages, is punitive, and vests no right in an injured party which the legislature cannot, before judgment, take away by repeal or amendment.—*Bay City & S. R. Co. v. Austin*, 21 Mich. 390.

A statute allowing recovery of more than the value of the property is not penal but remedial, the object being not so much the punishment of defendant as the indemnification of plaintiff.—*Aylsworth v. Curtis*, 19 R. I. 517, 34 Atl. 1109.

[5] Effect of receivership on right of action.

An action under a statute requiring a railroad to fence its right of way, etc., will lie, even though the road is in the hands of a federal receiver.—*Ohio & M. R. Co. v. Russell*, 115 Ill. 52, 3 N. E. 561.

[6] Limitation of action.

The Interstate Commerce Act prescribing no limitation of time within which actions thereunder must be brought, such actions must be governed, as to limitation, by the statutes of the state wherein they are brought.—*Ratican v. Terminal R. Assn.*, 114 Fed. 666.

An act allowing an attorney's fee to be taxed as part of the costs, in addition to treble damages, is penal, not compensatory, and hence is governed by limitations on statutory penalties.—*Baker Wire Co. v. Ch. & N. W. R. Co.*, 106 Iowa, 239, 76 N. W. 665.

[7] Pleadings.

In an action by a shipper against a carrier for violations of the Interst. Com. Act, § 2, the petition to recover is sufficient if it states facts which

show the circumstances and conditions under which the railroad had charged plaintiff a specified rate for transportation, and alleges in the language of the Act that for like services, under substantially similar circumstances and conditions, the defendant had charged another a less rate, without alleging facts which show the services to be alike, or rendered under substantially similar circumstances and conditions, or that plaintiff was charged more than the schedule rate.—*Kinnavey v. Terminal R. Assn.*, 81 Fed. 802.

In an action by a shipper against a carrier under Interst. Com. Act, § 2, the petition to recover was held insufficient where it failed to allege either that the carrier had no published schedule of rates, or that it charged plaintiff in excess of rates fixed thereby, for the schedule established, filed and published by the carrier pursuant to law is *prima facie* the criterion of the reasonableness of a rate complained of.—*Kinnavey v. Terminal R. Assn.*, 81 Fed. 802.

A declaration under a penal statute creating an offense known to the common law, and giving an action, should in some way show a violation of the statute, but it is not necessary to allege an offense in the terms of the statute.—*People v. Bartow*, 6 Cow. (N. Y.) 290.

To enable a shipper to recover against a railroad company under a statute, where the railroad would not otherwise be liable, the liability must in the complaint be averred to be under the statute.—*Hempstead v. N. Y. C. R. Co.*, 28 Barb. (N. Y.) 485.

[8] Trial.

Where plaintiff has jumbled together a cause of action at common law and one under the transportation act, he cannot, under the South Carolina Code of Civil Procedure, be compelled to elect upon which he will go to trial.—*Rountree v. Atlantic C. L. R. Co.*, 73 S. C. 268, 53 S. E. 424.

ARTICLE III.

Provisions Relating to the Powers of the Commissions in Respect to Common Carriers, Railroads and Street Railroads.

SECTION 45. General powers and duties of commissions in respect to common carriers, railroads and street railroads.

46. Reports of common carriers, railroad corporations and street railroad corporations.

47. Investigation of accidents.

48. Investigations by commission.

SECTION 49. Rates and service to be fixed by the commissions.

50. Power of commissions to order repairs or changes.

51. Power of commissions to order changes in time schedules; running of additional cars and trains.

52. Uniform system of accounts; access to accounts, et cetera *; forfeitures.

53. Franchises and privileges.

54. Transfer of franchises or stocks.

55. Approval of issues of stock, bonds and other forms of indebtedness.

56. Forfeiture; penalties.

57. Summary proceedings.

58. Penalties for other than common carriers.

59. Action to recover penalties or forfeitures.

60. Duties of commissions as to interstate traffic.

§ 45. General powers and duties of commissions in respect to common carriers, railroads and street railroads; †[power to administer oaths; power to recommend new legislation].—1. Each commission and each commissioner shall have power and authority to administer oaths, in all parts of the state, to witnesses summoned to testify in any inquiry, investigation, hearing or proceeding; and also to administer oaths in all parts of the state whenever the exercise of such power is incidentally necessary or proper to enable the commission or a commissioner to perform a duty or to exercise a power.

2. Each commission shall have the general supervision of all common carriers, railroads, street railroads, railroad corporations and street railroad corporations within its jurisdiction as hereinbefore defined, and shall have power to and shall examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their lines, owned, leased, controlled or operated, are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with all provisions of law, orders of the commission and charter requirements.

3. Each commission and each commissioner shall have power to examine all books, contracts, records, documents and papers of any person or corporation subject to its supervision, and by subpœna duces tecum to compel production thereof. In lieu of requiring production of originals by subpœna duces tecum, the

* Headnote of section as enacted (post, § 52) has the abbreviation "etc." instead of words "et cetera."

† Words in brackets not a part of section heading as enacted.—Ed.

commission or any commissioner may require sworn copies of any such books, records, contracts, documents and papers or parts thereof to be filed with it.

4. Either commission shall conduct a hearing and take testimony as to the advisability of any proposed change of law relating to any common carrier, railroad corporation or street railroad corporation, if requested to do so by the legislature, by the senate or assembly committee on railroads, or by the governor, and may conduct such a hearing, when requested to do so, by any person or corporation, and shall report its conclusions to the officer, body, person or corporation at whose request the hearing was held. The commission may also recommend the enactment of such legislation, with respect to any matter within its jurisdiction, as it deems wise or necessary in the public interest, and may draft or cause to be drafted such bills or acts as it may deem necessary or proper to enact into law the legislation recommended by it.

General powers of former Board of Railroad Commissioners,—see N. Y. R. R. L., § 157.

Each Commission shall possess all powers necessary or proper to enable it to carry out the purposes of this Act,—see ante, § 4.

Power of Commission to conduct investigations,—see also ante, § 11.

Proceedings of Commission deemed public records,—see ante, § 16.

Power of Commission to subpoena witnesses, take testimony and administer oaths,—see also ante, §§ 19, 20, post, § 66, subd. 1.

Power of Commission to examine or compel production of books, papers, etc.,—see also ante, §§ 19, 20, post, §§ 55, 66, subd. 9, § 69.

Investigations by the Commission, generally,—see ante, § 20, post, §§ 47, 48, 66, 71, 72.

Power of Commission to require special reports and information to be furnished by carrier,—see post, § 46.

Access of Commission to accounts, records, etc., kept by corporations subject to this Act,—see also post, §§ 52, 66, subd. 9.

Power of Commission to hold investigations to determine whether to approve issuance of stocks, bonds, and other forms of indebtedness,—see post, § 55.

Parallel provisions as to power of Commissions over gas and electrical corporations,—see post, § 66, subd. 5.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Who are common carriers,—see ante, § 2, notes [2]–[7].

What constitutes a railroad or street railroad,—see ante, § 2, note [8].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Effect of vacancies on power of commission,—see ante, § 4, note [5].

Validity of commission plan of regulation,—see ante, § 4, note [14].

Where hearings will be held,—see ante, § 19, note [1].

Compelling production of books and papers,—see ante, § 19, notes [3]–[6].

Punishment of witnesses for contempt,—see ante, § 19, notes [7]–[12].

Commission not bound by technical rules of procedure,—see ante, § 20, note [1].

Powers of former Board of Rapid Transit Railroad Commissioners.—see post, § 83, note [2].

In the course of an investigation by the Interstate Commerce Commission, subjects beyond the range of congressional regulation may be inquired into if such inquiry is necessary to a full comprehension of subjects concerning which Congress has power to legislate.—*Interstate Commerce Commission v. Harriman*, 157 Fed. 432.

Where one railroad company purchases large blocks of the stock of other railroad corporations, such acquisition is a matter which the Interstate Commerce Commission may investigate to determine whether the acts in question tend to defeat the purposes of the Interstate Commerce Act.—*Interstate Commerce Commission v. Harriman*, 157 Fed. 432.

The Interstate Commerce Commission will, in its discretion, make an investigation into abuses which it concededly has no power to correct, to the end that the need for remedial legislation may be demonstrated and emphasized.—*Matter of Alleged Unlawful Discrimination*, 11 Inters. Com. R. 587.

The Interstate Commerce Commission will recommend an adjustment of rates which seems the most fair to it, after investigation, even though it has not power to order such adjustment.—*Charlotte Assn. v. So. R. Co.*, 11 Inters. Com. R. 108.

The Interstate Commerce Commission will, when it seems of public advantage, investigate and make a public statement as to a situation, even though it has no power to remedy the abuses or do more than advise and suggest modes of adjustment.—*The Canadian Pac. Pass. Differentials*, 8 Inters. Com. R. 71.

Even though the carriers have it in their power to evade a corrective order of the Interstate Commerce Commission, it is the duty of the latter to condemn the rates, etc., found unreasonable and to indicate the basis

on which they should be readjusted.—*Chamber of Commerce v. Ch. M. & P. R. Co.*, 7 Inters. Com. R. 481.

The function performed by a commission in undertaking an investigation, where directed to make investigations and make an annual report for transmission to the legislature, is strictly analogous to that of a legislative committee of inquiry or investigation.—*People ex rel. Bender v. Milliken*, 185 N. Y. 35, 77 N. E. 872.

A writ of prohibition will not lie to restrain an investigation by an administrative commission.—*People ex rel. Bender v. Milliken*, 185 N. Y. 35, 77 N. E. 872.

A witness on an examination before a legislative committee has no right to be attended by counsel.—*People ex rel. McDonald v. Keeler*, 99 N. Y. 463, 2 N. E. 615.

“It is understood that under the present Public Service Commission Law the Commission has the right to issue certain orders, which orders may or may not be obeyed by the parties to whom they are issued. In the event of disobedience it then becomes the duty of the Commission to take the necessary steps judicially to compel obedience to such orders. Provision has been made by the law for the conduct of all investigations which may result in an order, in such manner as to afford the parties in interest all of the advantages of a hearing; that is, all of his rights, as I understand it, which they would have before any judicial tribunal in respect either of cross-examining witnesses or of calling witnesses in their own behalf, of justifying themselves in refusing to obey or in asking for modifications of the order. This particular investigation, [of the Interborough-Metropolitan Co. and the Brooklyn Rapid Transit Co.] however, is, as I understand it, not of that class, but is made under the general terms of the statute for the purpose of enabling the Commission to inform itself, and in all respects familiarize itself with the actual *status quo*, that is to say, with the problem with which it has to deal, and to that end not only to call witnesses with regard to the physical condition and operation of the railroad properties, but to call witnesses with regard to the financial condition of the several corporations, either lessor or lessee, and also to send an accountant or accountants, counsel or counsels in to the offices of the several companies for the purpose of making a thorough investigation and examination of the books of the companies.”—Extract from opening address of William M. Ivins, special counsel to the N. Y. Public Service Commission for the First District to conduct the investigation of the Interborough-Metropolitan Co. and the Brooklyn Rapid Transit Co.

§ 46. Reports of common carriers, railroad corporations and street railroad corporations; * [forfeiture for failure to file reports as required; with which commission reports should be filed].—Each commission shall prescribe the form of the annual reports required under this act to be made by common carriers, railroad and street railroad corporations, and may from time to time make such changes therein and additions thereto as it may deem proper; provided, however, that if any such changes or additions require any alteration in the method or form of keeping the accounts of such corporations, the commission shall give to them at least six months' notice before the expiration of any fiscal year of any such changes or additions, and on or before June thirtieth, in each year, shall furnish a blank form for such report. The contents of such report and the form thereof shall conform as near as may be to that required of common carriers under the provisions of the act of congress, entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and the act amendatory thereof approved June twenty-ninth, nineteen hundred and six, and other amendments thereto. The commission may require such report to contain information in relation to rates or regulations concerning fares or freights, agreements or contracts affecting the same, so far as such rates or regulations pertain to transportation within the state. When the report of any such corporation is defective, or believed to be erroneous, the commission shall notify the corporation to amend the same within thirty days. The originals of the reports, subscribed and sworn to as prescribed by law, shall be preserved in the office of the commission. The commission may also require such corporations to file monthly reports of earnings and expenses within a specified time. The commission may require of all such corporations specific answers to questions upon which the commission may need information. The annual report required to be filed by a common carrier, railroad or street railroad corporation shall be so filed on or before the thirtieth day of September in each year. The commission may extend the time for making and filing such report for a period not exceeding sixty days. If such corporation shall fail to make and file the annual report within the time above specified, or within the time as extended by the commission, or shall fail to make specific answer to any question, or shall fail to make the monthly reports when required by the commission as herein provided, within thirty days from the

* Words in brackets are not a part of section heading as enacted.—ED.

time when it is required to make and file any such report or answer, such corporation shall forfeit to the state the sum of one hundred dollars for each and every day it shall continue to be in default with respect to such report or answer. Such forfeiture shall be recovered in an action brought by the commission in the name of the people of the state of New York. The amount recovered in any such action shall be paid into the state treasury and credited to the general fund. Any railroad corporation operating a line partly within the second district and partly within the first district shall report to the commission of the second district; but the commission of the first district may, upon reasonable notice, require a special report from such railroad corporation. Any street railroad corporation operating a line partly within the first district and partly within the second district shall report to the commission of the first district; but the commission of the second district may, upon reasonable notice, require a special report from such street railroad corporation.

Reports by carriers to Interstate Commerce Commission,—see
Interst. Com. Act, § 20, post, Appendix B.

Reports of carriers to former Board of Railroad Commissioners,—
see N. Y. R. R. L., §§ 57, 158.

As to territorial jurisdiction of Commissions of the first and second
districts, generally,—see ante, § 5.

Power of Commission to establish a uniform system of accounts
and prescribe the manner in which such accounts shall be kept,—
see post, § 52.

Actions to recover forfeitures for failure to file annual reports,—see
post, § 59,

Annual and special reports by gas and electrical corporations,—see
post, § 66, subd. 6.

General power of the state to regulate property devoted to public use,
—see ante, § 1, notes [1]–[22].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

General rules of statutory construction,—see ante, § 1, notes
[23]–[40].

Purpose of regulative acts,—see ante, § 1, note [32].

Who are common carriers,—see ante, § 2, notes [2]–[7].

What constitutes a railroad or street railroad,—see ante, § 2,
note [8].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Effect of vacancies on power of commission,—see ante, § 4, note [5].

Validity of commission plan of regulation,—see ante, § 4, note [14].
Commission not bound by technical rules of procedure,—see ante, § 20, note [1].

Immunity of witnesses,—see ante, § 20, notes [2]–[9].

Whether requiring interstate carriers to file reports is a regulation of interstate commerce,—see ante, § 25, note [16].

The report of a railroad to the state commission is competent evidence against such railroad.—*Seaboard Air L. R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, affg. s. c. 48 Fla. 129, 37 So. 314, and 48 Fla. 150, 37 So. 658.

It may well be doubted whether a railroad company can rely, as evidence in its own behalf, upon a report made and filed by it.—*Seaboard Air L. R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, affg. s. c. 48 Fla. 129, 37 So. 314, and 48 Fla. 150, 37 So. 658.

Where a railroad has rendered a report to a commissioner of railroads as to its net and gross receipts from intra-state commerce, and the commissioner has ordered the company to put into effect a schedule of rates based on such report, the burden is on the company of showing that such report erred in purporting to include only intra-state traffic, but did in fact include interstate traffic, and hence was not a proper basis of computation.—*Commissioner of Railroads v. Wabash R. Co.*, 123 Mich. 669, 82 N. W. 526; affd. 126 Mich. 113, 85 N. W. 466.

An act requiring railroad corporations to file reports and certain information with the state railroad commission will not be construed not to apply to foreign corporations or interstate corporations doing business in the state. Such a requirement is not a regulation of interstate commerce, and is within the power of the state, even though Congress has made similar requirements as to interstate carriers.—*People v. Ch. I. & L. R. Co.*, 223 Ill. 581, 79 N. E. 144.

A state may require a railroad to make quarterly returns of its receipts and expenditures, to a commission, and make false swearing in any such returns perjury.—*Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607.

A private relator cannot use the name of the state in a suit to enforce the statutory penalties against a railroad for refusing to file a report, as required by law.—*State ex rel. Hodge v. Marietta & N. G. R. Co.*, 108 N. C. 24, 12 S. E. 1041.

§ 47. Investigation of accidents; * [notice of happening of accidents].—Each commission shall investigate the cause of all accidents on any railroad or street railroad within its district which result in loss of life or injury to persons or property, and which in its judgment shall require investigation. Every common carrier, railroad corporation and street railroad corporation is hereby required to give immediate notice to the commission of every accident happening upon any line of railroad or street railroad owned, operated, controlled or leased by it, within the territory over which such commission has jurisdiction in such manner as the commission may direct. Such notice shall not be admitted as evidence or used for any purpose against such common carrier, railroad corporation or street railroad corporation giving such notice in any suit or action for damages growing out of any matter mentioned in said notice.

Reports to Interstate Commerce Commission as to accidents,—see Interst. Com. Act, § 20, post, Appendix B.

Investigation of accidents by former Board of Railroad Commissioners,—see N. Y. R. R. L., § 159.

All documents in the possession of each Commission public records, see ante, § 16.

Actions by aggrieved persons for loss or damage caused by failure to comply with provisions of this Act,—see ante, § 40.

Power of Commission to prescribe form of special reports by carriers,—see ante, § 46.

Power of Commission to order safe regulations, appliances, etc., generally,—see post, § 49.

Power of Commission to order repairs or changes in tracks, motive power, etc., to promote the security of service,—see post, § 50.

Investigations by Commission generally,—see ante, § 45, subdiv. 2; post, § 48.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Who are common carriers,—see ante, § 2, notes [2]–[7].

What constitutes a railroad or street railroad,—see ante, § 2, note [8].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Effect of vacancies on power of commission,—see ante, § 4, note [5].

Validity of commission plan of regulation,—see ante, § 4, note [14].

Where hearings will be held,—see ante, § 19, note [1].

Compelling production of books and papers,—see ante, § 19, notes [3]–[6].

Punishment of witnesses for contempt,—see ante, § 19, notes [7]–[12].

Commission not bound by technical rules of procedure,—see ante, § 20, note [1].

Immunity of witnesses,—see ante, § 20, notes [2]–[9].

An “accident” is an event that takes place without one’s foresight or expectation, resulting in injury to person or property.—*Supreme Council v. Garigus*, 104 Ind. 133, 3 N. E. 818.

A state may require a railroad to give notice to a commission of any accident to a train, etc., attended with serious injury to any person.—*Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607.

One section of a Vermont statute authorized the Board of Railroad Commissioners to investigate the causes of accidents, and another authorized issuance of orders as to changes to facilitate public safety, etc. The Board gave notice to a railroad of its intention to investigate, under the first section but not of its intent to consider issuing orders under the second section.—*Held*, that an order issued at a hearing pursuant to such notice is void.—*In re Rutland R. Co.*, 79 Vt. 53, 64 Atl. 233.

The word “accident” includes the result of human fault held to be actionable negligence. It is not used, ordinarily, as synonymous with “mere accident” or “purely accidental,” or any similar term, but the opposite thereof.—*Ullman v. Ch. & N. W. R. Co.*, 112 Wis. 150, 88 N. W. 41, 56 L. R. A. 246.

§ 48. Investigations by commission; *[procedure on complaints; making of orders].—1. Each commission may, of its own motion, investigate or make inquiry, in a manner to be determined by it, as to any act or thing done or omitted to be done by any common carrier, railroad corporation or street railroad corporation, subject to its supervision, and the commission must make such inquiry in regard to any act or thing done or omitted to be done by any such common carrier, railroad corporation or street railroad corporation in violation of any provision of law or in violation of any order of the commission.

2. Complaints may be made to the proper commission by any person or corporation aggrieved, by petition or complaint in writ-

*Words in brackets not a part of section heading as enacted.—Ed.

ing setting forth any thing or act done or omitted to be done by any common carrier, railroad corporation or street railroad corporation in violation, or claimed to be in violation, of any provision of law or of the terms and conditions of its franchise or charter or of any order of the commission. Upon the presentation of such a complaint the commission shall cause a copy thereof to be forwarded to the person or corporation complained of, accompanied by an order, directed to such person or corporation, requiring that the matters complained of be satisfied, or that the charges be answered in writing within a time to be specified by the commission. If the person or corporation complained of shall make reparation for any injury alleged and shall cease to commit, or to permit, the violation of law, franchise or order charged in the complaint, and shall notify the commission of that fact before the time allowed for answer, the commission need take no further action upon the charges. If, however, the charges contained in such petition be not thus satisfied, and it shall appear to the commission that there are reasonable grounds therefor, it shall investigate such charges in such manner and by such means as it shall deem proper, and take such action within its powers as the facts justify.

3. Whenever either commission shall investigate any matter complained of by any person or corporation aggrieved by any act or omission of a common carrier, railroad corporation or street railroad corporation under this section it shall be its duty to make and file an order either dismissing the petition or complaint or directing the common carrier, railroad corporation or street railroad corporation complained of to satisfy the cause of complaint in whole or to the extent which the commission may specify and require.

Parallel provisions of Interstate Commerce Act,—see Interst. Com. Act, §§ 12-14, post, Appendix B.

A state railroad commission may act as complainant before the Interstate Commerce Commission,—see Interst. Com. Act, § 13, post, Appendix B.

Parallel provisions of New York Railroad Law,—see N. Y. R. R. L., §§ 159-162.

Territorial jurisdiction of Commissions for the receiving of complaints,—see ante, § 5.

Service and effect of orders made by Commissions after investigations,—see ante, § 23.

Actions in court by persons aggrieved for loss or damage caused by violations of this Act,—see ante, § 40.

Summary proceedings for enforcement of orders made by Commission after investigations,—see post, §§ 57, 74.

Actions in behalf of public to recover penalties and forfeitures for failure to comply with orders of the Commissions or provisions of this Act,—see post, § 59.

Investigations by Commission as to gas and electrical corporations,—see post, §§ 66, 71, 72.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

General power of the state to regulate rates and charges,—see ante, § 1, note [2].

Power of the state to regulate carriers' way of doing business,—see ante, § 1, note [2].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

General rules of statutory construction,—see ante, § 1, notes [23]–[24].

Purpose of regulative Acts,—see ante, § 1, note [32].

Who are common carriers,—see ante, § 2, notes [2]–[7].

What constitutes a railroad or street railroad,—see ante, § 2, note [8].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Validity of commission plan of regulation,—see ante, § 4, note [14].

Commission as administrative body,—see ante, § 4, note [15].

Where hearings will be held,—see ante, § 19, note [1].

Compelling production of books and papers,—see ante, § 19, note [3]–[6].

Punishment of witnesses for contempt,—see ante, § 19, notes [7]–[12].

Immunity of witnesses,—see ante, § 20, notes [2]–[9].

Rehearing before Commission,—see ante, § 22, notes [1]–[3].

Proceedings before the commission where violation of long and short haul rule is alleged,—see ante, § 36, note [19].

Investigation of accidents,—see ante, § 47, note.

[1] Power and duty to investigate.

Power of commission to conduct investigations for its own information,—see ante, § 45 and notes.

Effect of vacancies on power of commission,—see, ante, § 4, note [5].

The power of investigation is broader than the power of legislation.—*Interstate Commerce Commission v. Harriman*, 157 Fed. 432.

The Interstate Commerce Commission has power to conduct original investigations as well as investigate after complaint or petition.—*Interstate Com. Commission v. Harriman*, 157 Fed. 432.

The Railroad Commission of Louisiana was by the constitution of that state authorized to establish "reasonable and just rates, charges and regulations" with respect to the public service corporations subject to its jurisdiction.—*Held*, that this necessarily implies that the Commission make full investigation into the facts before it establishes its rates, charges and regulations.—*Cumberland T. & T. Co. v. R. R. Comm.*, 156 Fed. 823.

A carrier defendant is entitled to have its defense considered in the first instance, at least, by the Interstate Commerce Commission, upon a full weighing of all the circumstances and conditions on which "a lawful order" may be founded.—*Interst. Com. Commission v. So. R. Co.*, 105 Fed. 703.

The Interstate Commerce Commission is not a court, but a special tribunal whose duties, though largely administrative, are sometimes semi or quasi judicial. It is required to investigate and report. The law creating the commission does not mention its final act as a judgment. It renders no judgment, enters no decree. The rule of estoppel of record, at all times technical in character, cannot be invoked against a complainant.—*Toledo Prod. Exch. & E. Kemble v. L. S. & M. S. R. Co.*, 2 Inters. Com. R. 492, 569, 3 Inters. Com. R. 830, 5 I. C. C. R. 166.

A board of supervisors vested with power to regulate and fix water rates charged by private companies must make a proper effort to procure all necessary information to enable it to act fairly and intelligently. To fix the rates arbitrarily without investigation may defeat its action.—*Spring Valley W. W. v. San Francisco*, 28 Cal. 286, 22 Pac. 910, 6 L. R. A. 756.

A state may authorize a commission to hear and determine complaints as to the manner in which a railroad company operates its road, respecting any matter under the control of such commission.—*Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607.

Under authority vested in the North Carolina Railroad Commission to fix rates, etc., it has the incidental power to ascertain by investigation, etc., what particular corporation controls or operates any lines in the state, so that it may know against whom to make its orders and proceedings to enforce such orders or punish violation.—*State ex rel. Board of R. R. Comrs. v. W. U. Tel Co.*, 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570.

[2] Who may be complainants.

As association of warehousemen and forwarders may be complainants before the Interstate Commerce Commission, though they do not appear as shippers or consignees.—*American Warehousemen's Assn. v. Ill. Cent. R. Co.*, 7 Inters. Com. R. 556.

A live stock exchange has a sufficient interest in railroad rates to make it a proper complainant.—*Cattle Raisers' Assn. v. Fort Worth & D. C. R. Co.*, 7 Inters. Com. R. 513.

A voluntary protective association is entitled to be a complainant, whether representing its own members, or specially authorized to represent other shippers, or assuming in addition to represent shippers engaged in the same industry on the route of the defendant's lines.—*Milk Prod. P. Assn. v. D. L. & W. R. Co.*, 7 Inters. Com. R. 92.

A voluntary association of persons engaged in a commercial enterprise may complain to the Interstate Commerce Commission of violations of the Interstate Commerce Act.—*Boston & A. R. Co. v. Boston & L. R. Co.*, 1 Inters. Com. R. 291, 400, 500, 1 I. C. C. R. 158.

[3] Necessary or proper defendants.

Bringing in of interested parties in proceedings for enforcement of statutes relating to interstate commerce,—see Elkins Act, § 2, post, Appendix B.

Interested parties may be heard without being made parties to adjudication,—see ante, § 20, [1].

The initial carrier is a proper, but not a necessary, party defendant in a proceeding as to the legality of a through rate.—*Warren-Ehret Co. v. Cent. R. of N. J.*, 8 Inters. Com. R. 598.

Where carriers make and divide a joint rate, but only one of them is responsible for the terminal charge and service which is an element therein, the complaint is properly directed against the particular carrier and charge.—*Cattle Raisers' Assn. v. Fort Worth & D. C. R. Co.*, 7 Inters. Com. R. 513.

Where a local rate is complained of, but such local rate is part of a through rate, and it is in that relation that it is the subject of controversy, the complaint should be made against the through rate, and all the carriers composing the through lines are necessary parties.—*Chamber of Commerce v. Gt. Northern R. Co.*, 4 Inters. Com. R. 44, 230, 5 I. C. C. R. 571.

A complaint as to classifications, etc., cannot properly be made against a classification committee, but must be against designated carriers as such, even though the complaint be informal rather than formal.—*MacMillan & Co. v. Western Class. Committee*, 3 Inters. Com. R. 282, 4 I. C. C. R. 276.

Where the complaint seeks to correct the classification of freight made by the initial carrier, all the companies over whose lines the shipments must pass are proper, but not necessary, parties defendant.—*Hurlburt v. L. S. & M. S. R. Co.*, 2 Inters. Com. R. 15, 31, 81, 448, 2 I. C. C. R. 122.

In a proceeding as to the reasonableness of through rates, all the connecting carriers must be parties defendant.—*Michigan Congr. Water Co. v. Ch. & G. T. R. Co.*, 1 Inters. Com. R. 797, 2 Inters. Com. R. 12, 428, 2 I. C. C. R. 594.

The reasonableness of certain rates cannot be fairly determined in a proceeding to which some of the roads responsible for the rates are not parties.—*New Orleans Cotton Exch. v. C. N. O. & T. P. R. Co.*, 1 Inters. Com. R. 648, 2 Inters. Com. R. 289, 2 I. C. C. R. 345.

[4] Who should be permitted to intervene.

Where it is obvious that there are many parties as vitally interested as is the complainant, they will be permitted to appear on the taking of testimony.—*Spartansburg Bd. of Trade v. Richmond & D. R. Co.*, 2 Inters. Com. R. 15, 193, 2 I. C. C. R. 304.

In a proceeding before a state railroad commission, or in court upon an order of the commission, as to the rates charged by a carrier, another carrier not a party to the proceeding, though indirectly affected by its outcome, cannot formally intervene, as a matter of right. The commission and the court should, however, be liberal in hearing evidence, and in their discretion may hear that of persons not parties and only indirectly affected by the result.—*Steenerson v. Gt. Northern R. Co.*, 60 Minn. 461, 62 N. W. 826.

[5] Service of complaint.

While service of a complaint upon the controlling company is not a legal service upon the subsidiary company, it does for all practical purposes notify the latter of the proceeding, where the latter company is a proper but not a necessary party to the proceeding.—*Mayor of Wichita v. A. T. & S. F. R. Co.*, 9 Inters. Com. R. 534.

[6] Effect of receivership on proceedings before commission.

Effect of receivership on power to regulate generally,—see ante, § 2, note [15].

Leave of court need not be obtained before the beginning of a proceeding before the Interstate Commerce Commission against the receiver of a railroad.—*Evans v. U. Pac. R. Co.*, 6 Inters. Com. R. 520.

Complaints before the Interstate Commerce Commission do not come within the rules requiring the consent of the court appointing a receiver to be obtained before bringing any suit.—*Board of Trade v. Ala. Mid. R. Co.*, 6 Inters. Com. R. 1.

A receivership subsequent to complaint should not interfere with the progress of a proceeding brought merely for the purpose of railway regulation.—*Railroad Commission of Ga. v. Clyde Ss. Co.*, 4 Inters. Com. R. 120, 5 I. C. C. R. 324.

During the conduct of an investigation by the N. Y. Public Service Commission of the First District, touching improvements to be made in the property and in the methods of operation of the rapid transit railways of the City of New York, federal receivers were appointed for one of these railroads, the New York City Railway. Application was made to the court by the receivers for instructions as to whether they should appear and participate in the investigation. On September 30, 1907, Judge Lacombe issued a memorandum in which he directed that it was unnecessary for the receivers to appear and that the investigation should proceed against the owners and former operators of the road. [Ed.]

[7] Causes voluntarily submitted.

Even though an investigation by the Interstate Commerce Commission was instituted at the request of both parties to the controversy, whose written agreement is set forth in the findings, the Commission does not act in the capacity of arbitrators. In fact as well as form, it conducts a proceeding in accordance with the regulating statute, and its authority or duty is not dependent on or measured by the consent of either party.—*In the Matter of Freight Rates*, 11 Inters. Com. R. 180.

Parties may voluntarily submit to the Interstate Commerce Commission a given traffic situation, with a request that it determine, not only what rates would be lawful, but also what rates would be fair.—*In the Matter of Differential Rates*, 11 Inters. Com. R. 13.

Where a case is voluntarily submitted by the parties, and the facts deemed material to the question presented are set forth in the papers submitted, and there is no controversy between them as to the facts, the Interstate Commerce Commission will treat the matter as a case upon complaint, answer, and hearing of the parties, and make its order accordingly.—*Roth v. Tex. & P. R. Co.*, 9 Inters. Com. R. 602.

[8] Notice required.

The act creating the N. Y. Board of Railroad Commissioners clothed it with judicial powers to hear and determine upon notice, questions arising between the people and the corporation.—*People v. N. Y., L. E. & W. R. Co.*, 104 N. Y. 58, rev. 40 Hun (N. Y.), 570.

Proceedings by the board of commissioners of the metropolitan sanitary district of New York are in sufficient compliance with "due process of law" if they are upon due notice to the persons whose property may be affected, and give reasonable opportunity for them and their witnesses to be heard.—*Metropolitan Board of Health v. Heister*, 37 N. Y. 661.

An order made without notice to the railroad of an intent to consider at a specified hearing the issuance of such an order, is void.—*In re Rutland R. Co.*, 79 Vt. 53, 64 Atl. 233.

[9] Pleadings.

The Interstate Commerce Commission will permit the amendment of pleadings on the application of either party, on such notice as the Commission may direct.—*Rice v. Cincinnati, W. & B. R. Co.*, 3 Inters. Com. R. 841, 5 I. C. C. R. 193.

The practice of the Interstate Commerce Commission is not to proceed with any complaint until it is put in such form that other carriers, localities and dealers may have an opportunity to be heard and such as are necessary have been brought in as parties.—*McMillan & Co. v. Western Class. Committee*, 3 Inters. Com. R. 282, 4 I. C. C. R. 276.

A complaint and answer are sufficient to indicate the substantial controversy, and a replication to an answer is neither required nor allowed.—*Oregon S. L. R. Co. v. No. Pac. R. Co.*, 2 Inters. Com. R. 572, 639, 3 I. C. C. R. 264.

A complaint which does not allege that the articles were delivered for interstate transportation is insufficient to charge violations of the Interstate Commerce Act, but dismissal should be without prejudice.—*White v. Mich. Cent. R. Co.*, 2 Inters. Com. R. 551, 641, 3 I. C. C. R. 281.

The Interstate Commerce Commission will not permit an amendment to a complaint which substitutes for the original cause something new and different. Such a new case should be presented by a new complaint.—*Riddle Co. v. B. & O. R. Co.*, 1 Inters. Com. R. 701, 1 I. C. C. R. 372.

An amendment of a complaint will not be granted to bring in matters which could be proved under the original complaint.—*Delaware Grange v. N. Y. P. & N. R. Co.*, 1 Inters. Com. R. 649, 2 Inters. Com. R. 187, 799, 2 I. C. C. R. 309.

A complaint to the Board of Railroad Commissioners of Iowa, which, in substance, states merely that the complainant is an association "having in view the shipment of coal," etc., over the railroad complained of; that it applied for room on the railroad's sidetracks for the erection of a coal shed for its use in shipping coal, which application was rejected, is not sufficient for the Board to base an order founded on the theory that the railroad discriminated against the complainant, as there is no showing that the complainants were, or intended to be, shippers, nor that the railroad had ground for the location of the structure nor that any discrimination was practiced.—*State v. Ch. M. & St. P. Ry. Co.*, 86 Iowa 641, 53 N. W. 323.

[10] Investigations by commission on its own initiative.

If the Interstate Commerce Commission has power, of its own motion, to promulgate general decrees or orders, which thereby become rules of action to common carriers, such exertion of power must be strictly confined to the obvious purposes and directions of the statute, since Congress has not granted it legislative powers.—*Texas & P. R. Co. v. Inters. Com. Commission*, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666, revg. s. c. 57 Fed. 948, affg. s. c. 52 Fed. 187.

Where the Interstate Commerce Commission has made, on its own motion, an investigation of a general advance in rates in a given section, and concludes that such advance was not justified although the carriers are not in favorable financial condition, it may state the facts and its conclusions, but refrain from making an order in the premises except upon the duly adjudicated complaint of an aggrieved shipper.—*Rates from St. L. to Texas Common Points*, 11 Inters. Com. R. 238.

Where the Interstate Commerce Commission has made an investigation on its own motion, it may indicate the abuses but make no order, leaving the remedy to the voluntary action of the carriers, without prejudice to the rights of aggrieved shippers to sue for reparation.—*Matter of Charges for Transportation of Fruit*, 11 Inters. Com. R. 129.

When tariff schedules filed with the Interstate Commerce Commission show advances in rates for which there is no apparent warrant, the Commission may proceed to make an *ex parte* investigation, permitting the carriers and others to be heard if they so desire.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

No order can be made upon an *ex parte* investigation, but the Interstate Commerce Commission may announce its conclusions from such an investigation, and its intent to start proceedings in due form if its recommendations are not carried out by a certain date.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

The Interstate Commerce Commission may investigate of its own initiative, without a formal complaint or proof of direct damage to a complainant.—*In re Investigation of Grand Trunk R. Co.*, 2 Inters. Com. R. 496, 3 I. C. C. R. 89.

[11] Where question is already before a court.

Complainants brought an action in a state court for damages for discrimination in furnishing cars. Later they brought a proceeding for reparation, etc., before the Interstate Commerce Commission, because of the same abuses.—*Held*, that the pendency of the action in a state court did not bar the latter proceeding, though its pendency in a federal court would have had that effect.—*Gallogly v. C. H. & D. R. Co.*, 11 Inters. Com. R. 1.

If the question whether rates paid ought to be refunded in part because excessive, is before a court, the Interstate Commerce Commission will not take cognizance of it.—*Bishop v. Duval*, 2 Inters. Com. R. 302, 312, 514, 3 I. C. C. R. 128.

[12] Where relief asked is granted before hearing.

That the carrier has ceased charging an arbitrary complained of, does not prevent the Interstate Commerce Commission from investigating and deciding its legality.—*Blackwell M. & E. Co. v. Mo. K. & T. R. Co.*, 12 Inters. Com. R. 25.

Where the carrier's answer concedes that the charges complained of were erroneous, the complaint will be dismissed upon a showing that reparation has been made.—*Spiegle v. Chesapeake & O. R. Co.*, 11 Inters. Com. R. 367.

Where the cause of complaint has been removed and the statute substantially complied with, the case will be dismissed, without the entry of an order.—*Boyer v. Chesapeake, O. & S. R. Co.*, 7 Inters. Com. R. 55.

An investigation will be discontinued on proof of correction of the rates complained of.—*In re Pennsylvania R. Co.*, 7 Inters. Com. R. 177.

Where the relief asked for by the petition is conceded before the decision, no opinion will be filed.—*Pennsylvania Co. v. Louisville, N. A. & C. R. Co.*, 2 Inters. Com. R. 571, 603, 3 I. C. C. R. 223; *Lincoln Board of Trade v. U. Pac. R. Co.*, 1 Inters. Com. R. 702, 2 Inters. Com. R. 101, 3 I. C. C. R. 221.

If the carriers have abandoned the tariffs complained of, the commission will not order the carriers to desist from charging such tariffs, as such an order would be useless.—*Rawson v. Newport & M. V. R. Co.*, 2 Inters. Com. R. 311, 448, 626, 3 I. C. C. R. 266.

If before the hearing on a complaint as to excessive rates, the carrier reduces the rates to a figure satisfactory to the complainants, the Interstate Commerce Commission will not pass upon the abstract question of the reasonableness of the rates complained of.—*Bishop v. Duval*, 2 Inters. Com. R. 302, 312, 514, 3 I. C. C. R. 128.

Where the grievances complained of are obviated before the hearing, the Interstate Commerce Commission will express no opinions upon them.—*Lincoln Board of Trade v. U. Pac. R. Co.*, 1 Inters. Com. R. 702, 2 Inters. Com. R. 101, 2 I. C. C. R. 229.

If, after trial but before decision, the defendant concedes the relief asked by the petitioner, and puts it into effect, no order will be made or opinion announced by the Interstate Commerce Commission.—*Manufacturers' Union v. Minneapolis & St. L. R. Co.*, 1 Inters. Com. R. 483, 630, 1 I. C. C. R. 227.

[13] Requiring complainant to give a bond.

Where the defendant carrier objects to an order in favor of a complaint on the ground that the latter is financially irresponsible, the Interstate Commerce Commission may require the complainant to give the carrier a suitable bond of indemnity.—*Enterprise Transp. Co. v. Pa. R. Co.*, 12 Inters. Com. R. 373.

[14] Grounds for declining to consider a complaint.

The Interstate Commerce Commission is not the proper forum to which to appeal for the enforcement of a charter, statutory or common law obligation of a railroad, except as the Interstate Commerce Act expressly provides.—*Jones v. St. L. & S. R. Co.*, 12 Inters. Com. R. 167.

The Interstate Commerce Commission will dismiss without prejudice a complaint which it does not deem of practical consequence.—*Harrell v. Mo. K. & T. R. Co.*, 12 Inters. Com. R. 31.

The Interstate Commerce Commission may, in its discretion, decline to interfere with rates, etc., mainly local in their bearings, where it is clear that the railroad commission of the state has ample authority in law and perfect control over the situation.—*Hastings M. Co. v. Ch. M. & St. P. R. Co.*, 11 Inters. Com. R. 675.

If, under a court decision, the Interstate Commerce Commission believes it cannot make an enforceable order of relief, it will dismiss the complaint.—*Bureau of F. & T. v. Norfolk & W. R. Co.*, 11 Inters. Com. R. 235.

A proceeding before the Interstate Commerce Commission, instituted by aggrieved shippers who complain of an advance in rates made by certain carriers, is not a strictly private or personal suit, into which the party complainant must enter with "clean hands," but is a proceeding for the enforcement of a public duty as well as of an individual or private right.—*Tift v. So. R. Co.*, 10 Inters. Com. R. 548.

The Interstate Commerce Commission has no jurisdiction to determine whether, in making rates, regulations, etc., carriers acted wisely or unwisely, fairly or unfairly, as between themselves. The jurisdiction of the Commission is confined to inquiry whether acts done by the carrier infringe public rights as defined by the Interstate Commerce Act.—*New York Prod. Exch. v. B. & O. R. Co.*, 7 Inters. Com. R. 612.

It is not a valid objection to a complaint by a live stock exchange that some of its by-laws violate that anti-trust laws and hence it does not come into court with clear hands.—*Cattle Raisers' Assn. v. Fort Worth & D. C. R. Co.*, 7 Inters. Com. R. 513.

A carrier is not entitled to have a complaint dismissed because of absence of direct damage to the complainant.—*Milk Prod. P. Assn. v. D. L. & W. R. Co.*, 7 Inters. Com. R. 92.

That political considerations or personal spite actuated the complainant is not a matter of any importance, if the complaint and answer fairly present a question for the adjudication of the Interstate Commerce Commission.—*In re Boston & M. R. Co.*, 3 Inters. Com. R. 717, 5 I. C. C. R. 69.

Kemble was one of a committee which drew up and verified a complaint for the Toledo Produce Exchange. Later he tried to make complaint as an individual, as to the same state of facts. The former adjudication was pleaded against him.—*Held*, that his complaint as an individual was not barred, the technical doctrine of estoppel of record not being available before the Interstate Commerce Commission.—*Toledo Prod. Exch. & E. Kemble v. L. S. & M. S. R. Co.*, 2 Inters. Com. R. 492, 569, 3 Inters. Com. R. 830, 5 I. C. C. R. 166.

A complaint filed to get even for a fancied personal grievance does not commend itself to the Interstate Commerce Commission.—*Slater v. No. Pac. R. Co.*, 2 Inters. Com. R. 32, 243, 2 I. C. C. R. 359.

The Interstate Commerce Commission declines to express opinions on abstract questions, or on questions brought before it on *ex parte* statements of fact, or on questions of the construction of the law, without any controversy pending before it.—*In re Order of Railway Conductors*, 1 Inters. Com. R. 18, 1 I. C. C. R. 8.

Where a complaint made to the Interstate Commerce Commission offers no reasonable ground for investigation, it will not be filed.—*La Crosse M. & J.'s Un. v. Ch. M. & St. P. R. Co.*, 1 Inters. Com. R. 9, 1 I. C. C. R. 629.

Where persons patronizing a railroad at a particular point where no station facilities are provided have not sufficient interest in the matter to appear before the Public Service Commission, upon a hearing as to such facilities, in support of the desired improvement, nor even to manifest such interest by communications to the Commission, the improvement should not be ordered.—*Rockland Co. Citizens v. N. J. & N. Y. R. Co.* Decided by the N. Y. Public Service Commission for the Second District, April 16, 1908.

[15] Form of commission's findings and report of investigations.

Prima facie weight of findings of fact,—see ante, § 23, note [2].

The function of the Interstate Commerce Commission being both quasi-judicial and administrative in its nature, its procedure should be in substantial conformity to that of a court, or of a referee or master in chancery charged with the duty of finding the facts and applying the law thereto. Therefore the Commission must make reports or decisions in writing as to matters investigated by it, and such reports must include the findings of fact on which the decision of the Commission was based,

and such findings of fact are to be given weight as *prima facie* evidence, in any judicial proceeding thereafter had on such report. The Commission being composed of men of ability and experience, selected with regard to their special qualifications for this work, and giving their entire energies to the questions arising under the Act, its findings and opinions are entitled to great weight. But in order that their findings and decisions may have the force intended, and that judicial procedure thereon shall be in due form, it is necessary that such report shall show what the issues in the case are, and what facts it finds in regard to such issues. It is not sufficient for the report to consist of mere conclusions as to law or fact. It should suitably refer to and set forth the evidence as to contested points, and show the decision of the Commission upon such disputed facts; or if the evidence in regard to any fact is undisputed, it should be so stated by the Commission.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

[16] Practice and procedure on hearings.

Commission not bound by technical rules of procedure,—see ante, § 20, note [1].

Principles governing allowance of amendments,—see ante, § 20, note [1].

Upon an investigation after complaint as to a proposed change in classification, the Interstate Commerce Commission has the power, in the public interest, disembarrassed by any supposed admissions contained in the statement of the complaint, to consider the whole subject and the operation of the new classification in the entire territory, as also how far its going into effect would be just and reasonable, or would create preferences or engender discriminations.—*Cincinnati, H. & D. R. Co. v. Interst. Com. Commission*, 206 U. S. 142, 27 Sup. Ct. R. (U. S.) 648, affg. s. c. 146 Fed. 559.

The burden of proof with regard to the exaction of unreasonable rates is on the complainant.—*Interst. Com. Commission v. Nashville, C. & St. L. R. Co.*, 120 Fed. 934.

Where, in a case on trial before it, the Interstate Commerce Commission ought to receive and take into account evidence of certain facts, its refusal to do so is an error of law, as is also its failure to dispose of an issue of fact raised before it.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

It is the duty of those who institute formal proceedings before the Interstate Commerce Commission to prosecute their complaints with reasonable diligence, and when a case has been formally assigned for a hearing on a day certain the parties must appear and present such evidence as they may wish to offer in support of their contentions, or, in advance of the date set, make request for a postponement of the hearing

on stated grounds showing good and sufficient cause for delay.—*Producers' Pipe Line Co. v. St. L. I. M. & S. P. Co.*, 12 Inters. Com. R. 215.

Each complaint must be considered and decided on its own peculiar facts. Each traffic situation presents points of difference, and one case can seldom be an exact precedent for another.—*Danville v. So. R. Co.*, 8 Inters. Com. R. 409.

Where the Interstate Commerce Commission has decided the proper relation of certain freight rates, which relation determines where and how business shall be done, the decision, in the absence of some showing that new conditions have intervened or that the effects of the original holding have been other than were anticipated, will be controlling.—*Board of R. R. Comrs. v. A. T. & S. F. R. Co.*, 8 Inters. Com. R. 304.

The taking of proof in an investigation as to a whole system of rates, involving numerous commodities, may be confined to a single article, and the order entered only as to that, the Commission making known its opinion that the same principles should govern rate-making as to the other commodities.—*Violations of Act to Regulate Commerce by St. L. & S. F. R. Co.*, 8 Inters. Com. R. 290.

A decision of the United States Circuit Court of Appeals upon similar facts but as to different parties, will not technically be given the effect of a former adjudication, but it ought to be and is considered conclusive on the Interstate Commerce Commission as to the matters involved and decided.—*Cattle Raisers' Assn. v. Fort Worth & D. C. R. Co.*, 7 Inters. Com. R. 513.

If the defendant carrier does not answer a complaint, the Interstate Commerce Commission will take such proof of the facts as it deems proper, and then make such an order as the circumstances of the case may require.—*Tecumseh Celery Co. v. Cincinnati, J. & M. R. Co.*, 4 Inters. Com. R. 44, 318, 5 I. C. C. R. 663.

Where claim for reparation is made in a complaint of unreasonable rates, the burden is on the complainant to show the facts connected with the claim and establish the same; and when these facts have not been sufficiently brought out to enable the Commission to justly determine what reparation is due the complainant, it will decline to award reparation.—*Perry v. Florida C. & P. R. Co.*, 3 Inters. Com. R. 416, 740, 5 I. C. C. R. 97.

Where the verified answers of the carriers deny the allegations of the complaint and such denials are fortified by the testimony of witnesses, but the complainant does not appear at the hearing, though duly notified thereof, and offers no proof in support of the information and belief on which his allegations were based, the complaint must be dismissed.—*Rice v. St. L. S. W. R. Co.*, 3 Inters. Com. R. 724, 4 Inters. Com. R. 321, 5 I. C. C. R. 660.

Where the charges complained of are common to a considerable area of country and to numerous towns of equal or greater distance from the common market, and are maintained by all the roads whose lines extend into that territory, the Commission is reluctant to interfere with such a system of rates, particularly where many interests and localities affected are not represented in the proceeding.—*Lincoln Creamery Co. v. U. Pac. R. Co.*, 3 Inters. Com. R. 641, 794, 5 I. C. C. R. 156.

The Interstate Commerce Commission will not order carriers not parties to a proceeding to raise their rates, nor make such an order without giving the communities most directly affected a chance to be heard.—*Poughkeepsie Iron Co. v. N. Y. C. & H. R. R. Co.*, 3 Inters. Com. R. 248, 4 I. C. C. R. 195.

The carriers offered to waive objections to depositions which had been taken without notice, if the complainant would let all the evidence taken in a prior proceeding as to the situation be considered as evidence in this case. Complainant agreed to this, but later tried to rescind the agreement, even though he still had the right to put in any further evidence he desired.—*Held*, that the original agreement should govern the consideration of the case.—*Toledo Prod. Exch. & E. Kemble v. L. S. & M. S. R. Co.*, 2 Inters. Com. R. 492, 569, 3 Inters. Com. R. 830, 5 I. C. C. R. 166.

The Interstate Commerce Commission will, on a new or different complaint in a proceeding, correct its former decision, if that is shown to be erroneous.—*In re Petition of Prod. Exch. of Toledo*, 2 Inters. Com. R. 412, 2 I. C. C. R. 588.

A case will not be decided on a theory not advanced in the complaint nor on the taking of testimony.—*Martin v. C. B. & Q. R. Co.*, 2 Inters. Com. R. 32, 2 I. C. C. R. 25.

The Interstate Commerce Commission will not determine the relative reasonableness of rates over a large extent of territory, simply from the face of the tariffs, without proofs.—*Spartansburg Board of Trade v. Richmond & D. R. Co.*, 2 Inters. Com. R. 15, 193, 2 I. C. C. R. 304.

The Interstate Commerce Commission may not award the attorney's fee which the Interstate Commerce Act authorizes a court to award.—*Council v. Western & A. R. Co.*, 1 Inters. Com. R. 292, 355, 638, 1 I. C. C. R. 339.

[17] Decisions and orders by commission.

Dismissal of complaint with right to rehearing,—see ante, § 22, note [1].

Suspension of orders by Commission,—see ante, § 23, note [4].

Presumption of validity of orders,—see ante, § 23, note [1].

Judicial restraint of orders,—see ante, § 23, notes [10]–[19].

Federal interference with orders of state commissions,—see ante, § 23, notes [20]–[28].

Judicial enforcement of orders,—see post, § 57, notes.

Effect of receivership on enforcement of orders of Commission,—see post, § 57, note [15].

The Iowa Act creating a board of railroad commissioners with powers to fix reasonable charges on railroads, requires said board to make a schedule of maximum rates and empowers such board to investigate complaints as to rates and thereupon to make a decision as to rates to be charged thereafter.—*Held*, that the board could make a full schedule in any case where a complaint had been made and investigated.—*Chicago, B. & Q. R. Co. v. Dey*, 38 Fed. 656.

If the Interstate Commerce Commission finds an arbitrary unlawful, it may order the carrier not to charge the same during a period of two years, even though the carrier had ceased charging the arbitrary before the filing of the complaint.—*Blackwell M. & E. Co. v. Mo. K. & T. R. Co.*, 12 Inters. Com. R. 25.

Where the evidence shows the abuses but is not sufficient to warrant a specific order respecting an exact adjustment of rates, the Interstate Commerce Commission will announce the rules of rate-making to be followed, make definite suggestions, and hold the case open pending readjustment by the carrier.—*Menasha W. W. Co. v. A. T. & S. F. R. Co.*, 11 Inters. Com. R. 666.

Where the findings show a basis for an adjustment between the parties, the Interstate Commerce Commission will, in a proper instance leave the case open pending such amicable settlement.—*Dewey Bros. Co. v. B. & O. R. Co.*, 11 Inters. Com. R. 475.

The Interstate Commerce Commission will, in a proper case, decide as to the lawfulness of practices complained of, and leave the question of damages from the illegal practices open to further hearing in the same proceeding.—*Gallogly v. C. H. & D. R. Co.*, 11 Inters. Com. R. 1.

In a proper case, after due investigation of a complaint against one or more carriers, the Interstate Commerce Commission will make an administrative order directed to all carriers subject to its jurisdiction.—*American Warehousemen's Assn. v. Ill. Cent. R. Co.*, 7 Inters. Com. R. 556.

The Interstate Commerce Commission may decide a case as to what preventive relief is proper, but retain and continue the case as to the question of what reparation ought to be awarded to the complainants.—*Cattle Raisers' Assn. v. Fort Worth & D. C. R. Co.*, 7 Inters. Com. R. 513.

If the Interstate Commerce Commission finds that certain schedules of rates are inequitable, it may permit the carrier to readjust them and hold back its order until after such readjustment.—*Paine Bros. v. Lehigh V. R. Co.*, 7 Inters. Com. R. 218.

In a proper case, the Interstate Commerce Commission will dismiss a complaint without prejudice and with a proviso that the complainant may have a rehearing by asking for it.—*Wilson v. Rock Creek R. Co.*, 7 Inters. Com. R. 83.

In a proper case, the Interstate Commerce Commission may suspend the promulgation of an order pending readjustment of the rates complained of, with leave to the complainant to apply for such an order as may seem still to be needed after such readjustment and with leave to either side to present any further evidence on such application.—*Rea v. Mobile & O. R. Co.*, 7 Inters. Com. R. 43.

The Interstate Commerce Commission may make an order as to phases of an investigation which it has concluded, and retain other phases for further investigation and a later order.—*In re Boston & M. R. Co.*, 3 Inters. Com. R. 717, 5 I. C. C. R. 69.

Where the proof shows the petitioner is entitled to some damages but is insufficient as to the extent thereof, the case may be held open pro tem without an order and then dismissed when the parties file notice that they have adjusted the question of the amount of reparation.—*Macloon v. Ch. & N. W. R. Co.*, 3 Inters. Com. 452, 711, 5 I. C. C. R. 84.

Where all the carriers participating in a discrimination are not parties to the proceeding before the Interstate Commerce Commission, an order to desist will be issued against those which are parties, and the others will be ordered to show cause why a similar order should not be made against them.—*Hamilton v. C. R. & C. R. Co.*, 3 Inters. Com. R. 110, 122, 482, 4 I. C. C. R. 686.

Where carriers not shown to be legally connected with a discriminative differential nevertheless answered the complaint and endeavored to justify the differential, they will not be permitted to render the Interstate Commerce Commission's decision in the case ineffectual, by reducing their rates so as to maintain the same relative disparity.—*Eau Claire v. Ch. M. & St. P. R. Co.*, 3 Inters. Com. R. 174, 314, 4 Inters. Com. R. 65, 5 I. C. C. R. 264.

§ 49. Rates and service to be fixed by the commission; * [duty of carriers to obey orders of commission; power to establish through routes and joint rates].—Whenever either commission shall be of opinion, after a hearing, upon a complaint made as provided in this act, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons, freight or property within the state, or that the regulations or

*Words in brackets not a part of section heading as enacted.—Ed.

practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provision of law, the commission shall determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed. And whenever the commission shall be of opinion, after a hearing, had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances, or service of any such common carrier, railroad corporation or street railroad corporation in respect to transportation of persons, freight or property within the state are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations, practices, equipment, appliances and service thereafter to be in force and to be observed in respect to such transportation of persons, freight and property and so fix and prescribe the same by order to be served upon every common carrier, railroad corporation and street railroad corporation to be bound thereby; and thereafter it shall be the duty of every common carrier, railroad corporation and street railroad corporation to observe and obey each and every requirement of every such order so served upon it, and to do everything necessary or proper in order to secure absolute compliance with and observance of every such order by all its officers, agents and employees. The commission shall have power by order to require any two or more common carriers or railroad corporations whose lines, owned, operated, controlled or leased, form a continuous line of transportation or could be made to do so by the construction and maintenance of switch connection, to establish through routes and joint rates, fares and charges for the transportation of passengers, freight and property within the state as the commission may, by its order, designate; and in case such through routes and joint rates be not established by the common carriers or railroad corporations named in any such order within the time therein specified, the commission shall establish just and reasonable rates, fares and charges to be charged for such through transportation, and declare the portion thereof to which each common carrier or railroad corporation affected thereby shall be entitled and the manner in which the same shall be paid and secured.

Provisions stating what compensation may be received by corporations formed under the New York Rapid Transit Act,—see N. Y. Rap. Tr. Act, § 24, subd. 4, post, Appendix A.

Provisions of the New York Rapid Transit Act relative to the accommodations which must be furnished for the conveyance of passengers and property,—see N. Y. Rap. Tr. Act, § 28, post, Appendix A.

Transportation of property or freight defined,—see ante, § 1 (Subd. L.).

Territorial jurisdiction of the Commissions,—see ante, §§ 5, 25.

Duty of carriers to furnish safe and adequate service,—see ante, § 26.

Duty of carriers to charge rates just and reasonable in themselves,—see ante, § 26.

Power of Commission to order switch and sidetrack connections,—see also ante, § 27.

Duty of carriers to install switch and sidetrack connections,—see ante, § 27.

Duty of carriers not to charge rates relatively unreasonable,—see ante, § 31.

Duty of carriers not to give any undue preference or advantage,—see ante, § 32.

Duty of carriers not to discriminate between connecting lines,—see ante, § 35.

Power of Commissions to order through routes and joint rates,—see also ante, § 35.

Duty of carriers not to charge less for longer than for shorter distances,—see ante, § 36.

Duty of carriers to furnish sufficient cars and motive power,—see ante, § 37.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Who are common carriers,—see ante, § 2, notes [2]–[7].

What constitutes a railroad or street railroad,—see ante, § 2, note [8].

Compelling production of books and papers,—see ante, § 19, notes [3]–[6].

Punishment of witnesses for contempt,—see ante, § 19, notes [7]–[12].

Commission not bound by technical rules of procedure,—see ante, § 20, note [1].

Immunity of witnesses,—see ante, § 20, notes [2]–[9].

Provisions of Act applicable to through routes as well as single lines,—see ante, § 26, note [25].

Duty of carrier to charge rates reasonable in themselves,—see ante, § 26, note [29].

Divisibility of contract containing clause void for giving discriminatory rates,—see ante, § 31, note [9].

Complainant as to disparities between through and local rates must be person affected by rates,—see ante, § 31, note [75].

Who may complain as to discriminations under § 32,—see ante, § 32, note [3].

When commission will intervene to determine whether carriers unduly discriminate,—see ante, § 32, note [8].

Determination whether passes may be given,—see ante, § 33, note [16].

Whether action by commission is necessary before prosecution for violation of long and short haul clause,—see ante, § 36, note [42].

Investigation of accidents,—see ante § 47, note.

State Commission as proper complainant before Interstate Commerce Commission,—see post, § 60, note.

[1] Legislative control over rates and service—In general.

Power of the state to regulate the mode of operation of railroads,—see also, ante, § 1, note [2].

General power of the state to regulate rates and charges,—see also, ante, § 1, note [2].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

Effect of reservation of power to amend charter on power to regulate rates,—see ante, § 1, note [25].

Purpose of regulative acts,—see ante, § 1, note [32].

Effect of receivership on regulative power,—see ante, § 2, note [15].

State may regulate rates only on intrastate shipments,—see ante, § 25, note [10].

Extent of power of state to regulate as to safety appliances,—see ante, § 25, note [10].

Power of state to require posting of tariff schedules,—see ante, § 28, note [1].

Power of state to compel railroads to file reports,—see ante, § 46, note.

Power of state to require railroads to give notice of happening of accidents,—see ante, § 47, note.

The state may fix rates for transportation within its limits.—*Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. R. (U. S.) 418, affg. s. c. 64 Fed. 165; *Metropolitan Trust Co. v. Houston & T. C. R. R.*, 90 Fed. 683.

The appropriate regulation of the use of property is not “taking” it, within the meaning of the constitutional prohibition.—*Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, affg. s. c. 26 Grat. (Va.) 83.

When property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use.—*Peik v. Ch. & N. W. R. Co.*, 94 U. S. 164, affg. 19 Fed. 625; *Munn v. Illinois*, 94 U. S. 113, affg. s. c. 69 Ill. 80.

The legislature may regulate railroad rates within a state.—*Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, affg. s. c. Fed. Cases, No. 2,666; *People ex rel. Kimball v. Boston & A. R. Co.*, 70 N. Y. 569; *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856; *Chicago, B. & Q. R. Co. v. Anderson*, 72 Neb. 856, 101 N. W. 1019; *Delaware, L. & W. R. Co. v. Central Stockyards Co.*, 45 N. J. Eq. 50, 17 Atl. 146, 6 L. R. A. 855n.

A state may regulate a business within its territory which is clothed with a public interest.—*Munn v. Illinois*, 94 U. S. 113, affg. s. c. 69 Ill. 80.

The power of a municipality to regulate fares is subject to the limitations that (1) there must be a reasonable need on the part of the public, considering the nature and extent of the service, of lower rates and better terms than those existing, and that (2) the rates and terms fixed by an ordinance shall not be clearly unreasonable in view of all the conditions.—*Milwaukee Elec. R. & L. Co. v. Milwaukee*, 87 Fed. 577.

The legislature may fix the charges and regulate the service rendered by a railroad corporation.—*Beekman v. Saratoga & S. R. Co.*, 3 Paige (N. Y.), 45.

Municipalities, in exercising their police power over public service corporations, must regulate without discrimination or favoritism.—*Village of Carthage v. Central N. Y. Tel. & T. Co.*, 48 Misc. (N. Y.) 423, 96 N. Y. Supp. 917; revd. on other grounds, 110 App. Div. (N. Y.) 625, 96 N. Y. Supp. 919.

Corporations or individuals exercising public franchises or performing public services, unless there is a contract otherwise providing and which exempts them from the operation of the general rule, are subject to the power of the legislative department to regulate their compensation for such services, the limitation to this doctrine being that such compensation must be reasonable.—*Leadville Water Co. v. Leadville*, 22 Colo. 297, 45 Pac. 362.

The state may fix the maximum rates which a telephone company may charge.—*Hockett v. State*, 105 Ind. 250, 5 N. E. 178.

State regulation of property vested with a public use is not an interference with constitutional rights.—*Hockett v. State*, 105 Ind. 250, 5 N. E. 178.

The legislature may fix rates and make regulations for the service rendered by common carriers.—*Chicago, I. & L. R. Co. v. R. R. Commission*, 38 Ind. App. 439, 78 N. E. 338.

A state cannot regulate the allowance of terminal elevator charges by the railroads on interstate shipments.—*State v. Omaha Elev. Co.*, — Neb. —, 110 N. W. 874.

The legislature may forbid any advances in railroad rates.—*Chicago, B. & Q. R. Co. v. Anderson*, 72 Neb. 856, 101 N. W. 1019.

[2] — Effect of statutes on existing companies.

The fact that a business was established before the passage of an act regulating the charges therein, does not exempt such business from the application of the statute.—*Munn v. Illinois*, 94 U. S. 113, affg. s. c. 69 Ill. 80.

[3] — Right to further regulate.

Effect of maximum rates prescribed in N. Y. R. R. L., § 37, upon right of state to further regulate rates.—*Dillon v. Erie R. Co.*, 19 Misc. (N. Y.) 116, 43 N. Y. Supp. 320.

[4] — Commission plan of regulation.

Validity of commission plan of regulation,—see also, ante, § 4, note [14].

Commissions as administrative bodies,—see ante, § 4, note [15].

It is within the power of the Texas legislature to create a state railroad commission and vest it with power to classify and regulate rates.—*Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. R. (U. S.) 1047; *Tilley v. Savannah, F. & W. R. Co.*, 5 Fed. 641.

The state may empower a commission to regulate rates and service on the railways of the state.—*Georgia R. & B. Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. R. (U. S.) 47, affg. s. c. 70 Ga. 694.

An act of the Iowa legislature empowering the state Board of Railroad Commissioners to make and enforce a schedule of rates for railroad charges is not an unconstitutional attempt to delegate legislative power. The legislature merely establishes rules and principles, and leaves the execution and details of administration to its creatures.—*Chicago & N. W. R. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744n.

The power of the state to fix rates may be exercised by a commission provided there is a standard fixed by which the commission is to be guided.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 341; revd. on other grounds, 191 N. Y. 123, 83 N. E. 693.

Where a statute gives to a commission the power to fix maximum rates, it matters not whether the standard by which the commission is to be guided be fixed by common law or by the statute.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203,

107 N. Y. Supp. 341; revd. on other grounds, 191 N. Y. 123, 83 N. E. 693.

Where a statute gives a commission power "within the limits prescribed by law," to fix a maximum rate, the statute is not invalid on the ground that no standard of charges is fixed, since the clause "within the limits prescribed by law," fixes the standard, which is a reasonable rate.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 341; revd. on other grounds, 191 N. Y. 123, 83 N. E. 693.

An especially created and skilled tribunal is better qualified to pass on the reasonableness of a rate than is a court or jury.—*Louisville & N. R. Co. v. Commonwealth*, 106 Ky. 633, 21 Ky. L. R. 232, 51 S. W. 164, 1012.

A state may vest a commission with power to revise railroad rates upon complaint.—*Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607.

[5] Acts within power of commission—In general.

Power of former Board of Railroad Commissioners to correct abuses in rates and service.—see N. Y. R. R. L., §§ 160-163.

Control of former Board of Rapid Transit Railroad Commissioners over operation of roads and rates of fare.—see N. Y. Rap. Tr. Act, § 34d, post, Appendix A.

Each Commission shall possess all powers necessary and proper to enable it to carry out the purposes of this Act.—see ante, § 4.

Power of Commission to excuse non-compliance with requirements as to filing and posting tariff schedules.—see ante, § 28, note [5].

Power as to connecting carriers.—see ante, § 35, note [9].

Power to conduct investigations.—see ante, § 48, note [1].

Who may grant franchises.—see post, § 53, note [13].

Powers of former Board of Rapid Transit Railroad Commissioners.—see post, § 83, note [2].

Congress has power to subject to regulations every carrier engaged in interstate commerce, and to adopt such regulative measures as will destroy favoritism in rates. Therefore, although the Interstate Commerce Act may not contain an express prohibition that an interstate carrier may not become a dealer in commodities transported by it, the court will enforce the provisions and purposes of the Act, even though in so doing it renders it impossible for a carrier to deal in such commodities.—*New York, N. H. & H. R. Co. v. Interst. Com. Commission*, 200 U. S. 361, 26 Sup. Ct. R. (U S.) 272.

Prohibition of interstate transportation of lottery tickets is within the regulative power of Congress under the interstate commerce clause of the U. S. Constitution.—*The Lottery Cases*, 188 U. S. 321, 23 Sup. Ct. R. (U. S.) 321.

"Commerce," under the interstate commerce clause of the U. S. Constitution, includes navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph.—*The Lottery Cases*, 188 U. S. 321, 23 Sup. Ct. R. (U. S.) 321.

A state may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders, but can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.—*Illinois Cent. R. Co. v. Illinois*, 163 U. S. 142, 16 Sup. Ct. R. (U. S.) 1096, revg. s. c. 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119.

A railroad operating exclusively in one state is nevertheless subject to the jurisdiction of the Interstate Commerce Commission if it enters into an agreement for through rates for shipments to or from outside the state, over its lines, and participates in such through rates.—*Cincinnati, N. O. & T. P. R. Co. v. Interst. Com. Commission*, 162 U. S. 184, 16 Sup. Ct. R. (U. S.) 700.

Elevating, receiving, weighing and discharging grain is not interstate commerce, but the regulation thereof is within the police power of the state.—*Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. R. (U. S.) 468, affg. s. c. sub nom. *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559n.

Power to regulate commerce includes power to regulate its adjuncts.—*U. S. v. Adair*, 152 Fed. 737.

Power to regulate interstate commerce gives power to enact a law forbidding carriers to discriminate against an employee because of membership or non-membership in a labor union.—*U. S. v. Adair*, 152 Fed. 737.

The power to regulate interstate commerce authorizes regulation as to all the subjects of such commerce, the persons and corporations engaged in it, and the instruments by which it is carried on.—*Kelley v. Gt. Northern R. Co.*, 152 Fed. 211.

The power to regulate commerce embraces all the instrumentalities of such commerce.—*Snead v. Central of Ga. R. Co.*, 151 Fed. 608.

The Mississippi Railroad Commission cannot force an interstate carrier to adopt tariffs, freight rules, regulations and classifications of freight, etc., in respect to the transportation of goods from points within the state to points without, for that would be a regulation of interstate commerce.—*Mobile & O. R. Co. v. Sessions*, 28 Fed. 592.

A state cannot adopt any regulation which does or may operate injuriously upon the commerce of other states.—*Kaiser v. Ill. Cent. R. Co.*, 18 Fed. 151.

The Interstate Commerce Commission possesses no common law jurisdiction or powers.—*Jones v. St. L. & S. R. Co.*, 12 Inters. Com. R. 167.

It is doubtful whether a case could arise under which the Interstate Commerce Commission would be warranted, if it had the legal authority, in directing carriers to prefer export to domestic traffic.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

The Interstate Commerce Commission may not interfere with transportation arrangements made by the federal commissioners of emigration.—*Savery v. N. Y. C. & H. R. R. Co.*, 1 Inters. Com. R. 695, 2 Inters. Com. R. 210, 2 I. C. C. R. 338.

The legislature has not invested the N. Y. Board of Railroad Commissioners with the function of granting or withholding relief based upon contractual obligations.—*People ex rel. Loughran v. Board of R. R. Comrs.*, 158 N. Y. 421, 53 N. E. 163, affg. s. c. 32 App. Div. (N. Y.) 158, 52 N. Y. Supp. 908.

A common carrier has absolute control of his property and power to make reasonable rules and regulations concerning it, except only to the extent that it has been devoted to a public use.—*Barney v. Oyster Bay & H. S. Co.*, 67 N. Y. 301.

The Texas Railroad Commission has power to correct abuses defined by law, but not to enact a law or rule defining given acts or conditions as an abuse.—*Railroad Commission v. Houston & T. C. R. Co.*, 90 Tex. 340, 38 S. W. 750.

The provisions of a constitution giving the legislature power to pass laws to regulate rates, correct abuses and prevent unjust discriminations and extortion, invest that body not only with power to legislate as to rates, but to correct all abuses of franchises as well as abuses connected with, or growing out of the exercise of such franchises.—*Railroad Commission v. Houston & T. C. R. Co.*, 90 Tex. 340, 38 S. W. 750.

[6] — Determination as to rates.

— — In general.

Power of Interstate Commerce Commission to fix rates,—see Interst. Com. Act, § 15, post, Appendix B.

Power of Commissions to regulate rates and service of gas and electrical corporations,—see post, §§ 66, 67, 71, 72.

Power of state to vest a commission with power to fix rates,—see ante, § 4, note [14].

Whether the regulation and fixing of rates is a judicial or administrative function,—see ante, § 4, note [18].

Determination as to reasonableness and justice of a rate, a judicial question,—see ante, § 4, note [19].

When Interstate Commerce Commission will leave adjustment of rates to state commissions,—see ante, § 25, note [20].

Meaning of term "rate",—see ante, § 26, note [26].

What is a "rebilling rate",—see ante, § 26, note [27].

Right of carriers to determine reasonableness of rates in the first instance,—see also, ante, § 26, note [32].

Power to prohibit rates unreasonably low,—see ante, § 26, note [46].

Power to grant relief from long and short haul provision,—see ante, § 36, note [11].

Relief from long and short haul rule granted only upon petition and after investigation,—see ante, § 36, note [12].

The Interstate Commerce Commission has no power to fix rates in the first instance.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45, affg. s. c. 74 Fed. 715, 69 Fed. 227; *Interst. Com. Commission v. C. N. O. & T. P. R. Co.*, 167 U. S. 479, 17 Sup. Ct. R. (U. S.) 896; *Jewett v. Ch. M. & St. P. R. Co.*, 156 Fed. 160; *So. Pac. Co. v. Colorado F. & I. Co.*, 101 Fed. 779; *Interst. Com. Commission v. Northeastern R. Co.*, 83 Fed. 611, affg. 74 Fed. 70; *Farmers' Loan & T. Co. v. No. Pac. R. Co.*, 83 Fed. 249; *Interst. Com. Commission v. Lehigh V. R. Co.*, 74 Fed. 784; *Interst. Com. Commission v. Northeastern R. Co.*, 74 Fed. 70; affd. 83 Fed. 611.

The Interstate Commerce Act (as it stood March 30, 1896) did not expressly or by implication confer on the Interstate Commerce Commission the power to itself fix rates. It is argued that the power to pass on the reasonableness of existing rates implies a right to prescribe rates. The reasonableness of the rate, in a given case, depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight. If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission to be reasonable.—*Cincinnati, N. O. & T. P. R. Co. v. Interst. Com. Commission*, 162 U. S. 184, 16 Sup. Ct. R. (U. S.) 700.

That a provision giving a *prima facie* or conclusive force to rates fixed by a state commission is unconstitutional, will not invalidate the power of the commission to fix rates, nor the rates fixed by the commission.—*Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 14 Sup. Ct. R. (U. S.) 1047.

The power with respect to rates conferred upon the Interstate Commerce Commission by the Interstate Commerce Act is wholly inconsistent with the right of courts to pass upon the reasonableness of an established rate.—*Kiser Co. v. Central of Ga. R. Co.*, 158 Fed. 193.

The power to initiate and establish rates for interstate transportation rests with the carrier, subject to the limitations prescribed by law that such rates shall be reasonable and just in themselves and not unjustly discriminatory between persons, places or kinds of traffic and subject also to the power of the Interstate Commerce Commission, when satisfied, after full hearing upon complaint made, that the rates demanded, charged or collected by the carrier are unjust and unreasonable, or unjustly dis-

criminary, to determine and prescribe what shall be a just and reasonable maximum rate to be thereafter charged.—*Jewett v. Ch. M. & St. R. R. Co.*, 156 Fed. 160.

A state commission may fix different passenger rates for different carriers.—*Houston & T. C. R. Co. v. Storey*, 149 Fed. 499.

The Interstate Commerce Commission has no power to determine with reference to the past what was a reasonable rate and thereupon declare that the rates should not in future be raised above that which it has adjudged to be reasonable.—*Southern Pac. R. Co. v. Colorado F. & I. Co.*, 101 Fed. 779.

Federal courts have no power to fix a schedule of rates for interstate carriers.—*Southern Pac. R. Co. v. Colorado F. & I. Co.*, 101 Fed. 779.

The authority to "regulate" street railway corporations does not vest a city with power to fix rates thereon.—*Old Colony T. Co. v. City of Atlanta*, 83 Fed. 39; *affd.* 88 Fed. 859.

The Interstate Commerce Commission has no power to fix rates, and especially no power to order that rates from a given point to one city shall bear a specified relation to rates from that point to another city.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

The Interstate Commerce Act is not to be construed so as to abridge or destroy the common law right of the carrier to make contracts, and adopt proper business methods, further than the terms and recognized purposes of the act may require.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

The Interstate Commerce Commission now has the power to fix a rate which the carrier may not exceed.—*Cattle Raisers' Assn. v. Mo. K. & T. R. Co.*, 12 Inters. Com. R. 5.

The Interstate Commerce Commission has no authority to fix a minimum rate.—*Savannah Bureau v. Charleston & S. R. Co.*, 7 Inters. Com. R. 458; *Commercial Club v. Ch. R. I. & P. R. Co.*, 6 Inters. Com. R. 347; *Cincinnati Freight Bureau v. C. N. O. & T. P. R. Co.*, 7 Inters. Com. R. 180.

The Interstate Commerce Commission cannot order unreasonably low rates to be increased.—*In re Chicago, St. P. & K. C. R. Co.*, 2 Inters. Com. R. 55, 137, 2 I. C. C. R. 231.

The power to fix rates or compensation means only the power to fix reasonable rates and just compensation.—*Spring Valley W. W. v. San Francisco*, 82 Cal. 286, 22 Pac. 910, 6 L. R. A. 756.

A commission may fix rates, etc., through jurisdiction over a corporation which controls another railway corporation under a contract which gives the former the right, license or permission to operate the latter.—*State v. Seaboard Air L. R. Co.*, 48 Fla. 129, 37 So. 314; *affd.* 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109.

Where the charter of a railroad provides that the company may regulate its tolls and rates and that the legislature may alter or reduce its rates but not so as to produce less than 15 per cent. on the capital stock, and said charter is later amended by a provision that the company may make all rules and regulations "not repugnant to the constitution and laws of the United States and of this state," a statute providing that railroads shall not charge unjust nor unreasonable rates and creating a commission with power to make a schedule of maximum rates for railroads, is not unconstitutional as impairing the obligation of contract.—*Chicago, B. & Q. R. Co. v. Jones*, 149 Ill 361, 37 N. E. 247, 24 L. R. A. 141.

A state law requiring street railway companies to transport public school children at half fare is constitutional.—*Commonwealth v. Conn. Valley St. R. Co.*, — Mass. —, 82 N. E. 19; *Commonwealth v. Interstate Con. St. R. Co.*, 187 Mass. 436, 73 N. E. 530.

The Massachusetts Railroad Commission is not empowered to consider the general subject of rates, but particular rates upon the complaint of any shipper.—*Littlefield v. Fitchburg R. Co.*, 158 Mass. 1, 32 N. E. 859.

Under the statutes of Nebraska providing for a board of transportation, and prohibiting unjust and unreasonable rates, such board may determine what is a just and reasonable charge on all railroads within the state in advance of the rendition of the service by the roads.—*State v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313, 35 N. W. 118.

The North Carolina Corporation Commission may prescribe freight rates.—*Corporation Commission v. Seaboard Air L. R. Co.*, 127 N. C. 283, 37 S. E. 266.

[7] — — Rates merely threatened.

The Interstate Commerce Commission possesses no power or authority to pass upon the lawfulness of rates merely threatened to be put in effect by a carrier.—*Jewett v. Ch. M. & St. P. R. Co.*, 156 Fed. 160.

[8] — — Compromises with carrier.

A board of railroad commissioners cannot enter into any compromise or arrangement with a carrier that will sanction or continue rates within the state which are not reasonable and just.—*Nebraska v. Fremont E. & N. V. R. Co.*, 23 Neb. 117, 36 N. W. 305.

The Nebraska Railroad Commission found that certain rates within the state were 33⅓ per cent too high. It then made an arrangement with the roads whereby, in consideration of their reducing certain interstate rates to Chicago, the Commission accepted a less reduction than 33⅓ per cent. on the intra-state rates.—*Held*, that such an arrangement was unlawful.—*State v. Fremont E. & M. V. R. Co.*, 23 Neb. 117, 36 N. W. 305.

[9] — — Rates for elevation, weighing, etc.

A statute regulating the rates and management of elevators is a proper exercise of the police power of a state, and neither denies the owners the equal protection of law nor deprive them of property without due process of law.—*Brass v. Stoeser*, 153 U. S. 391, 14 Sup. Ct. R. (U. S.) 857.

An act of the New York Legislature, fixing maximum charges for receiving, elevating, weighing and discharging grain is a legitimate exercise of the police power of the state over business affected with a public interest, and the services rendered are not interstate commerce.—*Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. R. (U. S.) 468, affg. s. c. sub. nom. *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559n.

An act fixing a maximum charge for elevating, receiving, weighing and discharging grain by elevators and warehouses, is within the police power of the state.—*Matter of Annon*, 50 Hun (N. Y.), 413.

[10] — — Switching and demurrage charges.

Provisions of the Interstate Commerce Act requiring rates for the transportation and for the "receiving, delivering, storage or handling" of property by an interstate carrier, to be reasonable, are sufficiently broad to cover demurrage charges.—*Michie v. N. Y. N. H. & H. R. Co.*, 151 Fed. 694.

A state commission may regulate switching charges, for it is a local service, and has no reference to interstate shipments.—*Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. 849.

The Interstate Commerce Commission has no authority to fix rules and regulations governing reciprocal demurrage.—*Mason v. Ch. R. I. & P. R. Co.*, 12 Inters. Com. R. 70.

The Interstate Commerce Commission has power to regulate demurrage charges.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

[11] — — Ferry fares.

A statute fixing ferry fares is constitutional.—*Parker v. Metropolitan R. Co.*, 109 Mass. 506.

[12] — — Special services.

If a carrier treats the compression of cotton as an integral part of the service it renders the shipper, the Interstate Commerce Commission has jurisdiction to regulate such compression and the charges therefor.—*Muskogee Club v. Mo. K. & T. R. Co.*, 12 Inters. Com. R. 356.

The Interstate Commerce Commission has the same jurisdiction to inquire into the justice and reasonableness of icing charges, etc., as of any other charge for the transportation of passengers or property.—*Matter of Charges for Transportation of Fruit*, 11 Inters. Com. R. 129.

Appellant was a terminal railroad connecting two trunk lines, and performing switching to and from factories. It placed cars on scales on private tracks, ready for weighing.—*Held*, that this placing of cars on scales was within the scope of public service regulation as to rates, etc., by the state corporation commission.—*Norfolk & P. R. Co. v. Commonwealth*, 103 Va. 289, 49 S. E. 39.

[13] — Compelling furnishing of facilities.

Power of Commission to require interchange of cars by a railroad corporation and a street railroad corporation,—see also ante, § 35.

Duty of carrier to furnish passengers with seats,—see ante, § 26, note [16].

Determination as to fulfillment by carrier of duty to furnish safe and adequate facilities,—see ante, § 26, note [19].

Power to compel furnishing of special kinds of cars and equipment,—see ante, § 37, note [31].

Power of Commission as to stations and waiting rooms,—see post, § 50, note [4].

An order of the North Carolina Corporation Commission requiring a railroad to deliver cars from another state to the consignee on a private siding beyond its own right of way is void. Whether such an order would be valid, if applied only to state business, not decided.—*McNeill v. So. R. Co.*, 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722.

A Texas statute providing that, upon application by a shipper in due form, the carrier shall furnish sufficient cars, etc., regardless of every other consideration except strikes and other public calamities, is beyond the regulative powers of the state, in so far as it requires the furnishing of cars for shipments out of the state.—*Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 26 Sup. Ct. R. (U. S.) 491.

Under the Interstate Commerce Act as it stood Nov. 17, 1902, the Interstate Commerce Commission had no power to compel carriers to give to shippers the privilege of milling in transit.—*Diamond Mills v. Boston & M. R. Co.*, 9 Inters. Com. R. 311.

A state statute compelling express companies to extend equal facilities to all responsible consignors, including other express companies, is valid.—*Am. Express Co. v. So. Ind. Express Co.*, 167 Ind. 292, 78 N. E. 1021.

[14] — Supervision over operation of road.

— — — Conduct of business in general.

Power of Commission to relieve carriers from the necessity of having sufficient cars and motive power,—see also, ante, § 37.

Power of Commission to make regulations for the distribution of freight cars to shippers, the switching and loading of the same, and demurrage charges thereon,—see also ante, § 37.

Power of Commission to order repairs or changes in tracks, switches, motive power, etc.,—see also ante, § 50.

Power of Commission to order changes in time schedules or the running of additional cars and trains,—see also post, § 51.

Power of Commissions to prescribe the manner in which accounts shall be kept by carriers,—see post, § 52.

When Commission will interfere with method of operation,—see post, note [30].

Statute forbidding transportation of cotton by night not a regulation of interstate commerce,—see ante, § 25, note [16].

Whether compelling the transfer of cars by connecting carriers is a regulation of interstate commerce,—see ante, § 25, note [16].

Whether requiring interstate carriers to file reports is a regulation of interstate commerce,—see ante, § 25, note [16].

Whether statute forbidding transportation on Sunday is a regulation of interstate commerce,—see ante, § 25, note [16].

Power to compel the giving of sidetrack connections,—see ante, § 27, note [3].

Power to compel interchange of cars by connecting carriers,—see ante, § 35, note [9].

Power of state commission to compel installation of switches to facilitate transfer of cars by connecting carriers,—see ante, § 35, note [10].

Consideration of state and interstate business in determining whether switch uniting connecting lines will be ordered,—see ante, § 35, note [19].

Power to determine terms on which railroads intersect,—see ante, § 35, note [34].

Power to fix rules governing demurrage,—see ante § 37, note [31].

Power to prevent delay in transporting goods,—see ante, § 38, note [31]

Power over crossings and intersections,—see post, § 50, note [1].

Power of Commission to control method of keeping books and accounts,—see post, § 52, note.

The term "public convenience" and the like are not to be construed as giving the government the right to assume the management of a railroad and perform the functions of its officers.—*Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. R. (U. S.) 565, revg. 114 Mich. 460, 72 N. W. 328.

A Louisiana statute forbidding discrimination on account of race or color on railroads within the state, is an unconstitutional interference with interstate commerce, in so far as it relates to interstate traffic.—*Hall v. DeCuir*, 95 U. S. 485, revg. s. c. 27 La. Ann. 1.

Wisconsin L. 1905, p. 13, ch. 19, as amended by Laws Special Session 1905, p. 19, ch. 12, creating a Superior Grain and Warehouse Commis-

sion and requiring all grain sold, delivered or stored in Superior to be subject to weights and grades fixed by such Commission, is an attempt to force Wisconsin standards on interstate commerce, and hence void.—*Globe Elev. Co. v. Andrew*, 144 Fed. 871.

It is not within the province of the Interstate Commerce Commission to prescribe the method carriers shall adopt in imposing icing charges, so long as the price charged the shipper is fair.—*Matter of Charges for Transportation of Fruit*, 11 Inters. Com. R. 129.

The Interstate Commerce Commission is authorized by the Interstate Commerce Act to order carriers to cease and desist from subjecting any particular person, locality or description of traffic to undue prejudice or disadvantage, and its jurisdiction extends to a case of alleged unlawful prejudice to shippers of outward bound package freight, through enforcement by carriers of a regulation providing for the earlier closing of depots used for the reception of such freight.—*Cincinnati Chamber of Com. v. B. & O. S. W. R. Co.*, 10 Inters. Com. R. 378.

The power to prohibit an unlawful practice necessarily involves the power to determine and declare its unlawfulness.—*Pennsylvania Millers' Assn. v. Phila. & R. R. Co.*, 8 Inters. Com. R. 531.

The Interstate Commerce Commission has no jurisdiction to require railroads to make arrangements permitting commercial travelers to carry without additional charge an extra allowance of baggage, in return for a degree of exemption from liability.—*Traders' & T. Union v. Phila., etc., R. Co.*, 1 Inters. Com. R. 18, 1 I. C. C. R. 8.

If one railroad refuses to receive freight and cars from a connecting road, the latter is not confined to the railroad commission for redress. It may ask the courts to order an interchange, and if such an order is made and the two railroads cannot agree on the terms thereof, these may then, on application, be fixed by the railroad commission.—*Hudson Valley R. Co. v. Boston & M. R. Co.*, 45 Misc. (N. Y.) 520, 92 N. Y. Supp. 928; *affd.* 106 App. Div. (N. Y.) 375, 94 N. Y. Supp. 545.

The legislature may impose upon a railroad the duty to furnish drinking water to passengers.—*Southern R. Co. v. State*, 125 Ga. 287, 54 S. E. 160.

A grant of power to a city to fix the rates to be charged by street railroads must necessarily include the power to regulate the transferring of passengers from one line to another owned by the same company.—*Chicago U. Traction Co. v. City of Chicago*, 199 Ill. 484, 65 N. E. 451.

Since (a) the state may regulate rates; (b) the rate must be reasonable; (c) it must afford the carrier compensation over and above operating expenses, it is absurd to withhold from the state large control over

the method of operating, and consequent expenses.—*State v. Minneapolis & St. L. R. Co.*, 80 Minn. 191, 83 N. W. 60; *affd.* 186 U. S. 257, 22 Sup. Ct. R. (U. S.) 900.

Interchange of cars with connecting roads is the common and almost universal practice of railroad companies, the ordinary and usual way of doing business. The legislature may compel a carrier to do business in the ordinary and usual way, and therefore compel such interchange of cars as incidental to the business for which the company was chartered.—*Jacobson v. Wisconsin, M. & P. R. Co.*, 71 Minn. 514, 74 N. W. 893; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436n.

The North Carolina Corporation Commission may reduce the minimum number of tons which shall be accepted by railroads as a carload.—*Corporation Commission v. Seaboard Air L. R. Co.*, 127 N. C. 283, 37 S. E. 266.

[15] — — Embargo.

The Interstate Commerce Commission, under its power to prevent discriminations, has power to prevent abuses from the issuance of embargo notices.—*Rogers v. Phila. & R. R. Co.*, 12 Inters. Com. R. 352.

[16] — — Tickets.

Issuance of transfers by street railroads,—see ante, § 26, notes [58]–[72].

An act of the Michigan legislature requiring railroads to sell 1,000 mile books to passenger transportation is unconstitutional, because it discriminates between persons buying tickets, and because it interferes with the right of the carrier to run its business, thus taking its property without due process of law.—*Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. R. (U. S.) 565, *revg. s. c.* 114 Mich. 460, 72 N. W. 328.

The Interstate Commerce Commission has no power, ordinarily, to compel carriers to issue mileage, excursion or commutation tickets.—*Sprigg v. B. & O. R. Co.*, 8 Inters. Com. R. 443.

An act requiring railroads to issue mileage books is constitutional.—*Dillon v. Erie R. Co.*, 19 Misc. (N. Y.) 116, 43 N. Y. Supp. 320.

A statute of Massachusetts which provides that all railroads shall issue mileage books for travel within the state but permits the railroad commission to excuse railroads where public welfare or the financial condition of the road justify, is not objectionable on the ground that certain railroads may be exempted from the necessity of issuing mileage books, since the legislature can, if it sees fit, establish rates for each railroad separately, as different railroads may reasonably re-

quire different rates.—*Attorney-General v. Old Colony R. Co.*, 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112.

A Virginia statute requiring all railroads operating within the state to keep on sale at all times mileage books of 500 miles and over at a charge of not more than 2 cents a mile, is unconstitutional as depriving railroads of property without due process of law.—*Commonwealth v. Atlantic C. L. R. Co.*, 106 Va. 61, 55 S. E. 572.

[17] — — Stopping of trains.

Mandamus to compel stopping of trains,—see post, § 57, note [13].

A railroad commission, if a carrier does not otherwise furnish proper and adequate accommodations to a particular locality, may compel the stoppage thereof of state and interstate trains. In the absence of congressional legislation as to such stoppage of interstate trains, there is no illegal or improper interference with interstate commerce in such stoppage, unless the company was already furnishing all such proper and reasonable accommodation to the locality as may fairly be demanded.—*Mississippi R. R. Commission v. Ill. Cent. R. Co.*, 203 U. S. 335, 27 Sup. Ct. R. (U. S.) 90.

An Ohio statute, requiring stoppage of all passenger trains, including interstate trains, at places having more than 3,000 inhabitants, is not an unconstitutional interference with interstate commerce, but a reasonable exercise of the police power of the state in the interests of the convenience and adequacy of the facilities afforded the public.—*Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. R. (U. S.) 465, affg. s. c. 8 Oh. C. C. 220.

An order of the Railroad Commissioners of South Carolina requiring a railroad to stop, if flagged, two fast trains engaged in carrying interstate passengers, at a station where accommodations would otherwise be inadequate, is not a burden on interstate commerce.—*Railroad Comrs. v. Atlantic C. L. R. Co.*, 74 S. C. 80, 54 S. E. 224.

[18] — — Rate of speed.

Relief from ordinance regulating speed of trains,—see post, note [30].

When authorized so to do by the state legislature, a municipality may regulate the speed of trains within its limits, and this extends to interstate trains, in the absence of Congressional action on the subject.—*Erb v. Morasch*, 177 U. S. 584, 20 Sup. Ct. R. (U. S.) 819.

A city ordinance provided that it should be unlawful to run a train within the city at a rate exceeding ten miles per hour.—*Held*, that the ordinance was not void as placing unreasonable restrictions on interstate commerce.—*Peterson v. State*, — Neb. —, 112 N. W. 306.

A municipal corporation has the unquestioned right to regulate the speed of cars operated within its streets.—*Ashley v. Kanawha Valley Tr. Co.*, 60 W. Va. 306, 55 S. E. 1016.

[19] — — Cars and equipment.

Regulation of method of heating cars not a regulation of interstate commerce,—see ante, § 25, note [16].

The Interstate Commerce Commission has several times decided that it possesses no authority to compel carriers, subject to its jurisdiction, to provide any particular kind of cars or other special equipment.—*Rice v. Cincinnati, W. & B. Co.*, 3 Inters. Com. R. 841, 5 I. C. C. R. 193.

The Interstate Commerce Commission will investigate as to the fitness of cars used for transporting emigrants and compel the use of suitable cars.—*Savery v. N. Y. C. & H. R. R. Co.*, 1 Inters. Com. R. 695, 2 Inters. Com. R. 210, 2 I. C. C. R. 338.

The Interstate Commerce Act does not empower the Commission to order the carrier to furnish any particular equipment of cars, or any cars at all.—*Scofield v. L. S. & M. S. R. Co.*, 1 Inters. Com. R. 593, 2 Inters. Com. R. 67, 2 I. C. C. R. 90.

A state statute compelling railroads to heat passenger cars by apparatus other than stoves, is a valid exercise of police power and applies to railroads engaged in interstate commerce.—*People v. N. Y. N. H. & H. R. Co.*, 55 Hun (N. Y.), 409, 8 N. Y. Supp. 672; *affd.* without opinion, 123 N. Y. 635, 25 N. E. 953.

An act of the Missouri legislature requiring railroads to furnish double-decked cars for the transportation of sheep is constitutional and reasonable.—*Emerson v. St. L. & H. R. Co.*, 111 Mo. 161, 19 S. W. 1113.

[20] — Correction of classifications.

Whether determination as to reasonableness of classifications is a legislative function,—see ante, § 4, note [18].

Supervision of commission over method of making classification,—see ante, § 28, note [30].

Where railroads modify their official classification for shipments in certain territory, and it is found by the Interstate Commerce Commission that such modification brought about a general disturbance of the relations previously existing in that territory and created discriminations and preferences among manufacturers and shippers and between localities in such territory, the Commission acts within the powers conferred by the Interstate Commerce Act when it directs the carriers to cease and desist from further enforcing the classification operating such results.—*Cincinnati, H. & D. R. Co. v. Interst. Com. Commission*, 206 U. S. 142, 27 Sup. Ct. R. (U. S.) 648.

The Interstate Commerce Commission has power to order a change in classification.—*Myer v. C. C. C. & St. L. R. Co.*, 9 Inters. Com. R. 78; *Pyle v. T. & V. R. Co.*, 1 Inters. Com. R. 767, 1 I. C. C. R. 465.

The Interstate Commerce Commission has power to correct classifications of freight, etc., to prevent their being used as a device for unjustly discriminating or otherwise violating the statute.—*Coxe Bros. v. Lehigh V. R. Co.*, 2 Inters. Com. R. 195, 229, 3 Inters. Com. R. 460, 4 I. C. C. R. 535.

[21] — Regulations as to employees.

Extent of state and federal control over regulations as to employees, see ante, § 25, note [10].

Whether statutes requiring examination of engineers are a regulation of interstate commerce,—see ante, § 25, note [16].

Whether a regulation of employers' liability on interstate railroads is a regulation of interstate commerce,—see ante, § 25, note [16].

A state may require locomotive engineers, etc., to be examined by a tribunal appointed for that purpose, as to their ability to distinguish color signals, etc.—*Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. R. (U. S.) 28, affg. s. c. 83 Ala. 71, 3 So. 702.

An Alabama statute requiring the examination and licensing of all railway engineers is constitutional.—*Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. R. (U. S.) 564, affg. s. c. 76 Ala. 69.

Power to regulate interstate commerce confers power to regulate for the safety and protection of employees engaged in such commerce.—*Spain v. St. L. & S. F. R. Co.*, 151 Fed. 522.

[22] — Permitting limitation of liability.

Power to regulate limitation of carrier's liability,—see ante, § 38, note [12].

Authority to a corporation commission to make just and reasonable rates of freight gives no power to change the law and it is beyond the power of the commission to permit carriers to limit their liability for loss caused by negligence, to a certain fixed amount.—*Everett v. Norfolk & S. R. Co.*, 138 N. C. 68, 50 S. E. 557.

[23] — Regulation of tariff schedules.

Power of Commission to order changes in the form of schedules,—see also, ante, § 28.

Power of Commission to permit changes in published schedules of rates on less than 30 days' notice,—see also, ante, § 29.

Power of Commission as to matters to be included in tariff schedules, see ante, § 28, note [24].

The Interstate Commerce Commission may, by a general order, require carriers to state in their tariffs what free storage is granted and the terms and conditions on which it will be granted.—*American Warehousemen's Assn. v. Ill. Cent. R. Co.*, 7 Inters. Com. R. 556.

[24] — Ordering through routes and through rates.

Power of Interstate Commerce Commission to establish through routes and joint rates, and prescribe the division of such rates and the terms and conditions under which such through routes shall be operated,—see Interst. Com. Act, § 15, post, Appendix B.

When Commission will order through routes and rates,—see post, note [28].

Power to compel railroads to contract for joint through route and rate,—see ante, § 35, note [9].

The Interstate Commerce Commission may compel the establishment of a through route and through rate.—*Cattle Raisers' Assn. v. Galveston, H. & S. A. R. Co.*, 12 Inters. Com. R. 21; *Enterprise Transp. Co. v. Pa. R. Co.*, 12 Inters. Com. R. 373.

The Interstate Commerce Commission has no power to order a through route or through rate; through routes and rates are matters of agreement between the carriers themselves.—*New York, N. H. & H. R. Co. v. Platt*, 7 Inters. Com. R. 323.

The Interstate Commerce Act, as it stood Nov. 17, 1902, gave the Interstate Commerce Commission no power to establish through routes.—*Diamond Mills v. Boston & M. R. Co.*, 9 Inters. Com. R. 311.

The Interstate Commerce Commission has no power to compel a carrier to enter into arrangements for through rates or billing.—*Capehart v. L. & N. R. Co.*, 3 Inters. Com. R. 278, 4 I. C. C. R. 265.

A state railroad commission has no power to compel the establishment of a joint route.—*State v. Wrightsville & T. R. Co.*, 104 Ga. 437, 30 S. E. 891.

In a Georgia statute authorizing the railroad commission to make "joint rates," the term "joint rates," means a rate prescribed to be charged for the transportation of goods or passengers over the connecting lines of two or more railroads, and to be divided among them for the service rendered by each respectively.—*Hill v. Wadley So. R. Co.*, 128 Ga. 705, 57 S. E. 795.

A statute authorizing carriers to establish schedules of joint through rates to be filed with a state commission, does not give the commission any powers to fix such rates.—*State v. C. B. & Q. R. Co.*, 90 Iowa, 594, 58 N. W. 1060.

No distinctions in principle exist which deprive the state of authority and power to establish "joint through rates," while it may, in the exercise of its constitutional authority, fix rates of freight charges for each separate railroad.—*Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436n.

The objection that a statute which authorizes a railroad commission to fix joint rates between carriers compels two or more railroads to enter involuntarily into contractual relations with each other is untenable, since the commission, under the statute, merely prescribes rates and the railroads are not permitted to charge more. The railroad is not bound by an obligation as of a contract but under an obligation imposed by law.—*Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436n.

[25] — Enforcement of anti-trust laws.

The Interstate Commerce Commission has no jurisdiction over violations of anti-trust laws by interstate carriers, but only over unreasonable rates resulting from such violations.—*Warren Mfg. Co. v. So. R. Co.*, 12 Inters. Com. R. 447.

The Interstate Commerce Commission has no jurisdiction, directly or indirectly, to enforce the anti-trust laws, nor does it acquire any jurisdiction by those laws or their violation.—*Sprigg v. B. & O. R. Co.*, 8 Inters. Com. R. 443.

[26] General rules and principles governing Commission.

In passing upon rates and promulgating orders, the Interstate Commerce Commission must consider that the purpose of the Interstate Commerce Act is to promote and facilitate trade and commerce.—*Texas & P. R. Co. v. Interst. Com. Commission*, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666, revg. s. c. 57 Fed. 948, affg. s. c. 52 Fed. 187.

If the Interstate Commerce Commission, instead of confining its action to redressing, on complaint made by some particular persons or locality, some specific disregard of the provisions of the Interstate Commerce Act, proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the Act requires that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country.—*Texas & P. R. Co. v. Interst. Com. Commission*, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666, revg. s. c. 57 Fed. 948, affg. s. c. 52 Fed. 948.

The effort of the Interstate Commerce Commission to deprive inland consumers of the advantage of through rates is contrary to the purpose of the Interstate Commerce Act, which is to promote and facilitate

commerce.—*Texas & P. R. Co. v. Interst. Com. Commission*, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666, revg. s. c. 57 Fed. 948, affg. s. c. 52 Fed. 187.

It is only when, upon complaint, the Interstate Commerce Commission finds that a carrier is demanding, charging or collecting rates in violation of law, that it has power to interfere with rates.—*Jewett v. Ch. M. & St. P. R. Co.*, 156 Fed. 160.

The spirit and letter of the Interstate Commerce Act require that orders made by the Interstate Commerce Commission should have in view the promoting and facilitating of commerce.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 74 Fed. 715, affg. 69 Fed. 227; affd. 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45.

The carrier's business of transporting goods involves the rights of, and the necessity of doing justice to, three parties: the seller at the point of consignment, the carrier and the trader or consumer at the point of delivery. The interests of all these must be duly weighed by a commission or court in the decision of any case involving the carrier's freight tariff.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

It may often happen that a single rate out of an entire system of rates may, when examined by itself, appear to be unreasonable, even though, when considered as a part of the whole system, it is justifiable. To reduce this single rate would perhaps disarrange the entire system of rates in effect, and in a case of this sort the Interstate Commerce Commission ought not to interfere unless strong reasons are presented.—*Hastings Co. v. Ch. M. & St. P. R. Co.*, 11 Inters. Com. R. 675.

The Interstate Commerce Commission hesitates to require the establishment of carload rates where none exist, especially where the normal and accustomed unit of shipment is less than a carload.—*Kindel v. Boston & A. R. Co.*, 11 Inters. Com. R. 495.

If rates are exorbitant, oppressive and unreasonable, or if discriminations made are unjust and work hardship, it is the province of the Interstate Commerce Commission to interfere and secure, if possible, a fair adjustment, but it is no more its object or duty to place competing manufacturers of one kind in two different states on precisely the same footing, than to equalize conditions in all localities and in every industry.—*Mayor of Wichita v. Mo. Pac. R. Co.*, 10 Inters. Com. R. 35.

The Interstate Commerce Commission will not compel a carrier to disregard distance in order to put two localities on a commercial equality.—*Savannah Bureau v. Charleston & S. R. Co.*, 7 Inters. Com. R. 458; *Commercial Club v. Ch. R. I. & P. R. Co.*, 6 Inters. Com. R. 647; *Cincinnati Freight Bureau v. C. N. O. & T. P. R. Co.*, 7 Inters. Com. R. 180.

The Interstate Commerce Commission should not interfere with rates except when necessary to protect public interests.—*Commercial Club v. Ch. & N. W. R. Co.*, 7 Inters. Com. R. 387.

Where a carrier has been enforcing an arbitrary and variable scale of minimum carload weights which operate prejudicially to shippers, the Interstate Commerce Commission will order that the carrier shall establish a fixed, reasonable and just scale of minimum weights.—*Suffern, H. & Co. v. Indiana, D. & W. R. Co.*, 7 Inters. Com. 255.

Rates on various commodities must bear a just relation to each other as well as be reasonable per se.—*Page v. D. L. & W. R. Co.*, 6 Inters. Com. R. 548.

The Interstate Commerce Commission will act to prevent a considerable advance in rates which the carrier cannot sufficiently justify.—*R. R. Com. of Florida v. Savannah F. & W. R. Co.*, 3 Inters. Com. R. 414, 688, 5 I. C. C. R. 13.

The Interstate Commerce Commission will act to prevent the charging of arbitrary differentials which result in discriminations between places.—*Toledo Prod. Exch. & E. Kemble v. L. S. & M. S. R. Co.*, 2 Inters. Com. R. 492, 3 Inters. Com. R. 830, 5 I. C. C. R. 166.

The relation of rates ought to rest upon fixed and stable conditions.—*Squire v. Mich. Cent. R. Co.*, 2 Inters. Com. R. 303, 484, 3 Inters. Com. R. 515, 4 I. C. C. R. 611.

The Interstate Commerce Commission cannot undertake to adjust rates so as to overcome geographical or other conditions, and give competitors equality in the common market.—*Squire v. Mich. Cent. R. Co.*, 2 Inters. Com. R. 303, 484, 3 Inters. Com. R. 515, 4 I. C. C. R. 611.

The only fair and practicable plan for making up an export rate is to add the current ocean rate to the regular inland rate to the seaboard.—*N. Y. Prod. Exch. v. N. Y. C. & H. R. R. Co.*, 2 Inters. Com. P. 13, 28, 553, 3 I. C. C. R. 137.

The Interstate Commerce Commission will not order a change in rates at one point, which necessitates many changes and throws the entire transportation situation into confusion, unless such a change is absolutely necessary for enforcement of the law and the ends of substantial justice.—*Detroit Board of Trade v. Grand Trunk R. Co.*, 1 Inters. Com. R. 698, 701, 2 Inters. Com. R. 199, 2 I. C. C. R. 315.

Rates should not be fixed to equalize natural advantages and commercial conditions.—*Eau Claire v. Ch. M. & St. P. R. Co.*, 3 Inters. Com. R. 174, 314, 4 Inters. Com. R. 65, 5 I. C. C. R. 264.

When the Interstate Commerce Commission is asked to set aside a rate, consideration should be made of the consequences of a modification or rejection of the rate-making principles on which it is based.—*Lincoln Board of Trade v. Mo. Pac. R. Co.*, 1 Inters. Com. R. 648, 2 Inters. Com. R. 98, 2 I. C. C. R. 155.

Whether the elevated and steam surface railroads within a city should be placed upon the same basis with street surface railroads as to fares

and the transfer of passengers, is for the determination of the legislature, not the courts.—*People v. Brooklyn Heights R. Co.*, 187 N. Y. 48, 79 N. E. 838.

The railroad commissioners of Florida, in fixing a rate, must make it general, applicable to all persons or corporations under like circumstances and not applicable to certain persons or corporations only.—*State v. Atlantic C. L. R. Co.*, 51 Fla. 578, 40 So. 875.

In making a particular rate lower than a general one, a commission is not necessarily making an unjust discrimination.—*State v. Atlantic C. L. R. Co.*, 48 Fla. 114, 37 So. 652.

When the question presented to a railroad commission is what is just and right between two railways who must bear the expense of a crossing, if there is a contract existing between the companies, by which one of them is under obligation to bear all the expenses, the commission may not properly ignore the contract, for it is bound by the same rules of law that would govern a court in deciding the same question.—*Grand Trunk W. R. Co. v. Hunt*, — Ind. App. —, 81 N. E. 524.

A state railroad commission cannot ignore the comfort and convenience of numbers of its citizens, to base its action exclusively upon a consideration of the amount of dollars and cents which may be involved.—*Morgan's L. & T. R. & S. S. Co. v. R. R. Commission*, 109 La. 247, 33 So. 214.

[27] Classification of freight.

Power of Commission to correct classifications,—see ante, note [20].

Method of determining whether there is discrimination in classification,—see ante, § 31, note [79].

Keeping hay and straw in a certain class for thirteen years furnishes evidence that such classification was reasonable, and while the evidence is not conclusive, it is an admission against the need for any increase in such classification and rates.—*National Hay Assn. v. L. S. & M. S. R. Co.*, 9 Inters. Com. R. 264.

The fixing of a classification determines the relation of rates, not the rate itself.—*Myer v. C. C. C. & St. L. R. Co.*, 9 Inters. Com. R. 78.

Changing the classification of commodities is not fixing a rate for the future.—*Myer v. C. C. C. & St. L. R. Co.*, 9 Inters. Com. R. 78.

The Interstate Commerce Commission will correct injustice in the classification of freight.—*Pyle v. T. & V. R. Co.*, 1 Inters. Com. R. 600, 767, 1 I. C. C. R. 465.

A railroad commission cannot be compelled to give a special classification and rate of plaintiff's high-pressured cotton sufficient to maintain the advantage over their competitors represented by the superiority of

plaintiff's machinery.—*Railroad Commission of Texas v. Weld*, 7 Tex. Ct. R. 122, 73 S. W. 529, revg. s. c. 3 Tex. Ct. R. 805, 4 Tex. Ct. R. 302, 68 S. W. 1117.

[28] Through routes and rates—In general.

Publication of joint rates and through routes,—see ante, § 28.

Legislative control over joint tariffs,—see ante, § 28, note [26].

"Through routes" and "through rates" defined,—see ante, § 30, note [2].

What is lawful charge for through transportation when no joint rate has been established,—see post, § 30, note [8].

Limit of a proper through rate,—see ante, § 31, note [70].

Power of Commission to compel through routes and through rates,—see ante, note [24].

That a local rate is made part of a through rate does not render the through rate illegal.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 74 Fed. 715, affg. s. c. 69 Fed. 227; affd. 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45.

Charges by a railroad for switching cars received from, or delivered to, other lines held not a part of the fixed through rate.—*Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. 849.

Where the public interest require through routes and rates but the same have been withdrawn, the Interstate Commerce Commission will order their restoration, in its discretion holding the final order in abeyance till the carriers have worked out the details.—*American Nat. Live Stock Assn. v. Tex. & P. R. Co.*, 12 Inters. Com. R. 37.

The Interstate Commerce Commission will establish a through route and rate on beef cattle between given points, if it appears practicable to carry cattle that distance for slaughter.—*Birmingham P. Co. v. Tex. & P. R. Co.*, 12 Inters. Com. R. 33.

Ordinarily a through interstate passenger fare should not exceed the sum of the local state fares over the same route, though there is no legal requirement to that effect.—*Artz v. Seaboard Air Line R. Co.*, 11 Inters. Com. R. 458.

Carriers should not, as a general rule, be required to make through rates over indirect routes, or routes which are comparatively impracticable for the transportation of the traffic to which the rates are to be applied.—*Commercial Club v. Ch. R. I. & P. R. Co.*, 6 Inters. Com. R. 647.

While through rates are not required to be made on a strictly mileage basis, mileage is, as a general thing an element of importance, to be considered in fixing transportation charges.—*Board of Trade v. Ala. Mid. R. Co.*, 6 Inters. Com. R. 1.

Where the Pennsylvania R. Co. owns a portion of the through route, and a controlling interest in the capital stock of the corporation by

which the other part is operated, it cannot relieve itself from responsibility for excessive through rates by pleading the corporate existence of the latter company as a separate carrier.—*Brady v. Pa. R. Co.*, 1 Inters. Com. R. 649, 2 Inters. Com. R. 78, 2 I. C. C. R. 131.

A through bill is one of the most important and valuable of transportation facilities.—*Crews v. Richmond & D. R. Co.*, 1 Inters. Com. R. 490, 703, 1 I. C. C. R. 401.

[29] — Division of through rates.

When called upon to fix a through rate, the Interstate Commerce Commission will not fix the division thereof until it appears that the carriers are unable to agree upon a division.—*Cattle Raisers' Assn. v. G. H. & S. A. R. Co.*, 12 Inters. Com. R. 21.

If the through rates established by connecting lines are not unreasonable, the Interstate Commerce Commission cannot condemn the same on account of the divisions thereof to the various roads forming the through lines.—*Charlotte Assn. v. So. R. Co.*, 11 Inters. Com. R. 108.

If the allowances from a through rate in favor of the initial carrier are unreasonably large and result in unreasonably low proportions to the other connecting roads, this cannot be remedied by an advance in the total through rate charged to the public.—*Central Y. P. Assn. v. Ill. Cent. R. Co.*, 10 Inters. Com. R. 505; *Tift v. So. R. Co.*, 10 Inters. Com. R. 548.

The mere fact that a road is entirely owned by the largest individual shipper over it, or that it was originally organized and built for the purpose of doing the work of that shipper is not controlling against the making of joint rates with other railroads and the division thereof.—*Re Divisions of Joint Rates*, 10 Inters. Com. R. 385.

When an unlawful rate results from some arbitrary share or division of a joint rate exacted by one of the carriers, the Interstate Commerce Commission will find the facts and state its conclusions as to such share or division.—*Warren-Ehret Co. v. Central R. Co. of N. J.*, 8 Inters. Com. R. 598.

While it is true that the shipper or consignee has no direct interest in the way a joint rate is divided between the carriers, nor in the amount of the division received by each carrier, he is entitled to inquire into such division when he complains that the joint rate is unlawful, for the amount so received by the different carriers may be significant upon the reasonableness of the aggregate charge.—*Warren-Ehret Co. v. Central R. Co. of N. J.*, 8 Inters. Com. R. 598.

Under a statute authorizing railroad commissioners to establish through joint rates upon failure of railroads to do so after a demand by an interested person, the railroad commissioners will apportion the joint rate be-

tween the connecting carriers, considering matters which should affect the division.—*Burlington C. R. & N. Co. v. Dey*, 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436n.

The equitable principle of division between two or more connecting carriers, is the distribution pro rata of the aggregate rates, according to the length of carriage by each companion.—*Ackerly v. R. Co.*, 36 Wis. 252; *Rood v. Ch. M. & St. P. R. Co.*, 43 Wis. 146.

[30] Regulation of method of operation, practices, etc.

The Interstate Commerce Commission will correct the use of hypothetical weights, out of proportion to the actual weights, whereby tank shippers get more oil carried for the same money than barrel shippers.—*Rice v. Cincinnati, W. & B. R. Co.*, 3 Inters. Com. R. 841, 5 I. C. C. R. 193.

The Interstate Commerce Commission will forbid an arbitrary allowance to tank shippers of oil for leakage, etc., when no corresponding allowance is made to barrel shippers.—*Rice v. Cincinnati, W. & B. R. Co.*, 3 Inters. Com. R. 841, 5 I. C. C. R. 193.

The Interstate Commerce Commission will not compel a railroad to haul the sleeping cars of one private car company when it already has a sufficient supply of such cars from another company.—*Worcester Ex. Car Co. v. Pa. R. Co.*, 1 Inters. Com. R. 811, 2 Inters. Com. R. 12, 792, 3 I. C. C. R. 577.

A short road wholly within one state, owning no rolling stock but used by coal companies, is an "instrumentality of shipment or carriage," permission to use which on equal reasonable terms may be compelled by the Interstate Commerce Commission.—*Heck v. E. T. & V. R. Co.*, 1 Inters. Com. R. 498, 775, 1 I. C. C. R. 495.

It was not unfair and discriminatory for the common council of Buffalo to exempt the Belt Line Railroad from an ordinance regulating the speed at railroad crossings, such line being a local road carrying local passengers.—*Buffalo v. N. Y. L. E. & W. R. Co.*, 152 N. Y. 276, 46 N. E. 496, affg. s. c. 6 Misc. (N. Y.) 630, 27 N. Y. Supp. 297.

Where an ordinance required a street railway to run cars every 20 minutes between 12 M. and 6 A. M., the company, in endeavoring to show the unreasonableness of such a regulation, offered to show that it ran its cars for a time in obedience to the ordinance, and that they ran empty.—*Held*, that the exclusion of this testimony was improper.—*Mayor v. Dry Dock, E. B. & B. R. Co.*, 133 N. Y. 104, 30 N. E. 563.

The power of the police commissioner of New York City to regulate traffic on the streets thereof does not imply power generally to prohibit traffic on such streets or portions of streets, except in an emergency, like a conflagration or an abnormal congestion of traffic due to some unusual cause.—*Peace v. McAdoo*, 110 App. Div. (N. Y.) 13, 96 N. Y. Supp. 1039.

A railroad company will not be compelled to relay its track where the road cannot be operated except at a loss and there is no reasonable probability that the road will be operated if the track is replaced.—*State ex rel. Little v. Dodge City, M. & T. R. Co.*, 53 Kan. 329, 36 Pac. 755, 24 L. R. A. 564n.

It is the duty of a railroad carrying large quantities of milk to furnish special cars, with icing facilities therefor, if such cars and facilities are desirable from the view point of the producers, distributors and consumers.—*Baker v. Boston & M. R. Co.*, — N. H. —, 65 Atl. 386.

[31] Reasonableness of regulations.

Presumption of reasonableness of regulations,— see ante, § 23, note [1].

Where an express company made itself a common carrier of money under the South Dakota statute, by holding itself out to carry such money on specified conditions, and the Board of Railroad Commissioners prescribed other and broader conditions, it is no defense to the order of the commission that to obey the order would compel the express company to transact the business at a loss.—*Platt v. Le Cocq*, 150 Fed. 391.

Railroads carrying live cattle had commonly made a carload rate irrespective of weight and permitted the shipper to crowd into a car as many cattle as he desired. They changed the regulation by prescribing a maximum weight for a carload at the rate quoted, and then charging by the hundred pounds in proportion to such carload rate for any excess.—*Held*, that the new regulation is not only not unlawful, but is preferable.—*Leonard v. Ch. & A. R. Co.*, 2 Inters. Com. R. 416, 491, 599, 3 I. C. C. R. 241.

An ordinance requiring railroads crossing certain streets at grade to come to a full stop, is unreasonably discriminatory when it appears that only one road crosses such streets, which are little used, whereas other roads are permitted to cross populous and important streets without stopping.—*Buffalo v. N. Y. L. E. & W. R. Co.*, 152 N. Y. 276, 46 N. E. 496, affg. s. c. 6 Misc. (N. Y.) 630, 27 N. Y. Supp. 297.

The question of the reasonableness of a regulation that a street railway shall run cars every 20 minutes from 12 A. M. to 6 A. M. is not to be controlled by considerations of expense to the carrier. It is not a sufficient answer that the operation of cars all night would be unprofitable. The objection should be on the ground that the convenience of passengers does not require it.—*Mayor v. Dry Dock, E. B. & B. R. Co.*, 133 N. Y. 104, 30 N. E. 563.

It is not reasonable regulation to compel a public service corporation to make an exception in favor of some particular class in a community and serve the members of that class at a less sum than it has a right to charge those who are not members thereof.—*Rochester & C. Turnpike Co. v. Joel*, 41 App. Div. (N. Y.) 43, 58 N. Y. Supp. 346.

In determining whether the earnings of a branch line are sufficient to permit the state to require separate passenger trains thereon, the profits of that branch are not alone to be considered, but the whole business of the various parts of the road operated with that branch as a continuous line.—*People v. St. L. A. & T. H. R. Co.*, 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656.

A regulation made by a commission may be "unreasonable and unjust" without amounting to a taking of property without due process of law.—*Railroad Commission v. Houston & T. C. R. Co.*, 90 Tex. 340, 38 S. W. 750.

[32] Right of carrier to reasonable return on investment.

— In general.

Right to earn profit merely incidental,—see ante, § 1, note [4].

Compensation of carriers a payment in the nature of a tax,—see ante, § 1, note [5].

Charters as contracts with the state,—see ante, § 1, note [7].

Franchises as property which cannot be taken away without due process of law,—see ante, § 1, note [8].

Right to charge a reasonable sum as implied from powers given by charter,—see ante, § 1, note [9].

By the act of incorporation of a street railway company such company was made "subject to all the duties, liabilities and restrictions set forth in all general laws now or hereafter in force relating to street railways," etc. At the time of the incorporation of the company an act was in force requiring street railways to carry school children for one-half fare.—*Held*, that this act was by general reference incorporated into the charter of the company, which, having accepted the charter, could not be heard to complain that the carrying of school children at one-half price deprived it of property without due process of law.—*Interstate R. Co. v. Massachusetts*, 207 U. S. 79, 28 Sup. Ct. R. (U. S.) 26, affg. s. c. 187 Mass. 436, 73 N. E. 530.

Even if a state may not compel a railroad to do business at a loss, and conceding that a railroad may insist upon the right to establish such rates as will afford reasonable compensation for the services rendered, yet when it voluntarily establishes local rates for some shipments, it is estopped for resisting the power of the state to enforce the same rates for all.—*Alabama & V. R. Co. v. Miss. R. R. Commission*, 203 U. S. 496, 27 Sup. Ct. R. (U. S.) 163.

What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public.—*San Diego L. Co. v. Jasper*, 189 U. S. 439, 23 Sup. Ct. R. (U. S.) 571; *San Diego L. Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. R. (U. S.) 804, affg.

s. c. 74 Fed. 79; *Bradman v. Atlantic C. L. R. Co.*, 11 Inters. Com. R. 464; *Chicago U. Traction Co. v. City of Chicago*, 199 Ill. 579, 65 N. E. 470.

While it is a sound general proposition that railways are entitled to a fair and reasonable return upon the capital invested, it might not justify them in charging an exorbitant mileage in order to pay operating expenses, if the conditions of the country did not permit it.—*Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. R. (U. S.) 900, affg. s. c. 80 Minn. 191, 83 N. W. 60.

It is not indispensable to the correction by federal courts of an error of law into which the Interstate Commerce Commission has fallen whereby a specific rate is made unreasonably low, that the aggrieved party prove that the effect of this unreasonably low rate will make its entire business unprofitable. It is enough that the reduced rate is unjust and unreasonable.—Decision of the U. S. Circuit Court of the 8th Circuit June 30, 1908, — Fed. —.

A railway company is entitled to a fair return on its purely domestic business without reference to what it is earning on its interstate business or its business generally.—*Central of Ga. R. Co. v. McLendon*, 157 Fed. 961.

If a railway is earning less from its existing rates than will pay the proper proportion which its domestic business should bear of its subsisting and legal fixed charges, any attempt to reduce the rates in such way as that the company will sustain further loss of revenue would seem to be violative of its constitutional rights and entitle it to relief.—*Central of Ga. R. Co. v. McLendon*, 157 Fed. 961.

A railroad corporation is not entitled to earn an amount sufficient to provide a sinking fund for the discharge of its indebtedness, in addition to paying the interest thereon.—*Houston & T. C. R. Co. v. Storey*, 149 Fed. 499.

If a water plant is built for a larger area than it finds itself able to supply or if it does not yet have the customers contemplated, neither justice nor the Constitution require that a portion merely of the contemplated number shall pay the full return on the investment.—*Boise City Irr. & Land Co. v. Clark*, 131 Fed. 415.

Providing its rates are not discriminative, a railroad is entitled to earn the usual and legal rate of interest in the locality where it operates, on the actual value of the road and its equipment. Upon a showing that during 19 years it has earned much less than such legal interest, and on giving an indemnity bond, it is entitled to a preliminary injunction against reductions in rates ordered by a state railroad commission.—*Louisville & N. R. Co. v. Brown*, 123 Fed. 946.

Any state law or regulation establishing rates for the transportation of persons or property, which will not admit of the carrier earning such a compensation as is under all the circumstances just and reasonable to it and to the public, operates to deprive the company affected of its property without due process of law and to deny it the equal protection of the laws, and the enforcement thereof will be enjoined.—*Wallace v. Arkansas Cent. R. Co.*, 118 Fed. 422.

If rates fixed by a commission compel a railway company to conduct its operations at a loss or without a fair remuneration for its investment, then the property of the company is taken and used by the public without just compensation and it is deprived of property without due process of law.—*Matthews v. Board of Corp. Comrs.*, 106 Fed. 7.

The grant of a charter to a railroad company does not guarantee that it will or can make the investment at all times a paying one.—*Matthews v. Board of Corp. Comrs.*, 106 Fed. 7.

Rates to be charged by carriers cannot be fixed by the courts or a commission so as to amount to a taking of the property of the carrier.—*Metropolitan Trust Co. v. Houston, T. & C. R. Co.*, 90 Fed. 683.

It is not a defense to a proceeding to restrain the enforcement of an unreasonable rate that the plaintiff is a foreign corporation, doing business in the state only by sufferance, and may retire if the rates do not permit it to do business at a profit.—*Chicago & N. W. R. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744n.

A state board of railroad commissioners will be enjoined from enforcing a schedule of charges for switching cars in a city, which fixes the charges at less than the actual cost to the railroad company of the work.—*Chicago, St. P. M. & O. R. Co. v. Becker*, 35 Fed. 883.

An express company is entitled to charge a reasonable amount for the service which it gives; and this service being partly rendered by its own agents and employees, and partly by a railroad, it cannot justify a rate by producing its own contracts with the agents and the railroad. The question still remains what charge is reasonable, not what the company has contracted to make the service cost.—*Society Am. Florists v. U. S. Exp. Co.*, 12 Inters. Com. R. 138.

The Interstate Commerce Commission, in the making of its orders, will strictly respect the right of the railroad corporation to earn a fair return on its investment.—*Johnson v. Ch. M. & St. P. R. Co.*, 9 Inters. Com. R. 221.

The men who have conceived and executed a railway enterprise are entitled to a fair return upon the money which has been actually invested in it, and in addition, a reasonable profit upon the ability to

conceive and execute a profit of this sort.—*Danville v. So. R. Co.*, 8 Inters. Com. R. 409.

The right of a railroad to earn a return on its investment, is only the right to do so operating its property according to law.—*Brewer v. L. & N. R. Co.*, 7 Inters. Com. R. 224.

That unless permitted to charge a certain rate, a carrier cannot earn a return upon its investment does not justify such rate, if it contravenes any provision of the Interstate Commerce Act.—*Brewer v. L. & N. R. Co.*, 7 Inters. Com. R. 224.

The law entitles a carrier to fair return upon the property which it necessarily devotes to public use, and ordinarily it must be assumed that such fair return affords means to maintain the property in condition to enable the carrier to provide service which is safe and adequate for the reasonable public needs.—*In re Port Jervis Elect. L. P. G. & R. R. Co.* Decided by the N. Y. Public Service Commission for the Second District, May 12, 1908.

A public service company may, under some circumstances, be required to perform its services at rates prohibitive of a fair return to its stockholders, considering their property as an investment merely.—*Brunswick Water Dist. v. Water Co.*, 99 Me. 371, 59 Atl. 537.

In fixing rates, there is, on the one hand, the right of the company to derive a fair income, based on the fair value of the property at the time it is being used for the public, taking into account the cost of maintenance or depreciation, and current operating expenses; and, on the other hand, the right of the public to have no more exacted than the services in themselves are worth.—*Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

A railroad is entitled to fix such tariff of charges as will yield a fair compensation for the transportation of freight and assure that the net profits arising from the entire business, after payment of all the operating expenses, will pay a reasonable interest on the value of its property.—*Ala. & V. R. Co. v. R. R. Commission*, 86 Miss. 667, 38 So. 356.

A public service corporation is entitled to earn an amount sufficient to provide a sinking fund for the discharge of its indebtedness, in addition to paying the interest thereon.—*Brymer v. Butler W. Co.*, 179 Pa. 231, 36 Atl. 249.

An act requiring a railway to afford all reasonable facilities for the receiving, etc., of traffic, does not require it to maintain a station at a loss.—*Darlaston Local Board v. London & N. W. R. Co.*, 1894, 2 Q. B. D. (Eng.) 694.

[33] — Right to earn profit on every part of road and every service rendered.

The Corporation Commission of North Carolina ordered a railroad to run its trains so as to make connections with those of another line. The railroad objected to the order on the ground, amongst others, that to obey the order would necessitate the running of another train, which could not be done with profit.—*Held*, that as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. The mere incurring of a loss from the performance of such a duty does not, in and of itself, necessarily give rise to the conclusion of unreasonableness.—*Atlantic Coast Line R. Co. v. North Carolina Corp. Commn.*, 206 U. S. 1, 27 Sup. Ct. R. (U. S.) 585, affg. s. c. 137 N. C. 1, 49 S. E. 191.

A state commission may reduce the freight upon a particular article, provided the companies are able to earn a profit upon their entire intrastate business, and the burden of proof to show such unprofitableness is on the carrier.—*Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. R. (U. S.) 900, affg. s. c. 80 Minn. 191, 83 N. W. 60.

A railroad cannot claim to earn profit from every mile of its lines, but can only claim a profit upon the operation of its entire line.—*St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. R. (U. S.) 484, affg. s. c. 54 Ark. 101, 15 S. W. 18.

While a railroad is not entitled to earn a profit on every mile of its road, nor upon every article carried by it, nevertheless it is entitled to earn a reasonable profit upon its entire intrastate business.—*Southern R. Co. v. McNeill*, 155 Fed. 756.

It is not a sufficient objection to a regulation compelling a street railroad company to operate its cars all night, that a compliance with the order would be unprofitable.—*Mayor v. Dry Dock, E. B. & B. R. Co.*, 133 N. Y. 104, 30 N. E. 563.

[34] Reasonableness a question of fact.

Reasonableness of classifications,—see ante, note [27].

Reasonableness of through rates,—see ante, note [28].

Discretion of carrier in fixing rates,—see ante, § 26, note [28].

Burden of showing unreasonableness of rates,—see ante, § 26, note [34].

Reasonableness of switching charges,—see ante, § 27, note [14].

Presumption of legality of rates filed and posted,—see ante, § 28, note [14].

The reasonableness of a rate is a question of fact.—*Illinois Cent. R. Co. v. Interst. Com. Commission*, 206 U. S. 441, 27 Sup. Ct. R. (U. S.) 700; *Interst. Com. Commission v. Ch. G. W. R. Co.*, 141 Fed. 1003.

The only rule that can be laid down for determining the reasonableness of rates, is that each particular rate shall be judged on its particular facts.—*Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. R. (U. S.) 900, affg. s. c. 80 Minn. 191, 83 N. W. 60.

Whether in a particular case there has been an undue preference or discrimination, is a question of fact depending on the matters proved in each case.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45, affg. s. c. 74 Fed. 715, 69 Fed. 227.

[35] Test of reasonableness.

Published rates the standard of reasonableness,—see ante, § 28, note [13].

Lowest rate given should be the standard,—see ante, § 31, note [19].

The equal protection of the laws—the spirit of common justice—forbids that one class should be compelled by law to suffer loss that others may gain. The court will not look with favor on legislation to secure the common benefit at the expense of a single class.—*Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. R. (U. S.) 1047.

The fundamental question is: Will the rates prescribed by the state pay the expenses of doing the local business and leave to the carrier a reasonable compensation upon the fair value of the property it employs in performing the services.—*Northern Pac. R. Co. v. Keyes*, 91 Fed. 47.

The test of the reasonableness of a rate is not the amount of profit in the business of the shipper, but whether the rate yields a reasonable compensation for the service rendered.—*Central Y. P. Assn. v. Ill. Cent. R. Co.*, 10 Inters. Com. R. 505; *Tift v. So. R. Co.*, 10 Inters. Com. R. 548.

The reasonableness of rates relates to both consumer and company. Rates must be reasonable to both when possible, but when they cannot be to both, they must be to the customer.—*Brunswick Water Dist. v. Water Co.*, 99 Me. 371, 59 Atl. 537.

[36] When railroad considered independent line.

Merely because a railroad is operated in connection with other roads owned by the same company, but operated under different charters, with the result that its earnings are increased and operating expenses decreased, does not prevent its being considered an independent line, in determining the reasonableness of rates fixed by the state.—*Louisville & N. R. Co. v. Brown*, 123 Fed. 946.

[37] How great a return should be allowed.

See also ante, notes [32], [33]; *post*, note [51].

A railway ought to be allowed to accumulate, in some form, a surplus during prosperous years which may tide over subsequent years not so prosperous.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

Transportation charges should be liberal until the earnings are fully sufficient for a fair return on actual investment, but this does not justify maintenance of grossly discriminative rates, no matter how long they have been maintained.—*Cary v. Eureka Springs R. Co.*, 7 Inters. Com. R. 286.

The rates on the great staples should be so low as to allow only a very moderate profit to the carrier.—*In re Excessive Rates on Food Products*, 3 Inters. Com. R. 93, 4 I. C. C. R. 48.

If a railroad was built and operated wisely and economically, if it is located where public need requires it, where there is business to justify its existence, and constructed so as to be fit and well adapted for the business which it aims to accommodate, it should be entitled to return as good interest on the cost of the reproduction of the road as capital invested in the average of other lines of enterprise, with due regard to the general prosperity or business depressions.—*Steenerson v. Gt. Northern R. Co.*, 69 Minn. 353, 72 N. W. 713.

[38] Matters considered in determining as to reasonableness of rates — In general.

Matters to be considered in determining whether switch connections will be ordered,— *see ante*, § 27, note [5].

Determination of proper classifications,— *see ante*, § 28, notes [32]–[34].

Construction of classifications sheets,— *see ante*, § 28, note [37].

Determination of comparative reasonableness of rates,— *see also ante*, § 31, notes [25]–[31].

Contracts between carriers and shippers relevant in determining as to comparative reasonableness of rates,— *see ante*, § 31, note [30].

Relations between carrier and shipper relevant in determining as to comparative reasonableness of rates,— *see ante*, § 31, note [30].

Dissimilarity of circumstances and conditions as justifying disparities in rates,— *see ante*, § 31, notes [32]–[56].

Exclusive patronage of shipper as justifying giving of discriminatory rate,— *see ante*, § 31, note [46].

Orders of military authorities as justification for discriminations,— *see ante*, § 31, note [53].

Direction of movement of traffic as excusing discriminatory rates,— *see ante*, § 31, note [55].

Consideration of extent of patronage in determining whether there is unjust discrimination in furnishing facilities,—see ante, § 32, note [17].

There are a great many factors and circumstances to be considered in fixing a rate. Among other things: (1) The value of the service to the shipper, including the value of the goods and the profit he could make out of them by shipment. This is considered an ideal method, and also practical, being based in a principle similar to that underlying taxation.—*Interst. Com. Commission v. B. & O. R. Co.*, 43 Fed. 37; *affd.* 145 U. S. 263, 12 Sup. Ct. R. (U. S.) 844. (2) The cost of service to the carrier. This is an ideal theory, but not practical. Such cost cannot be ascertained accurately enough to make it controlling.—*Western U. Tel. Co. v. Call Co.*, 181 U. S. 92, 21 Sup. Ct. R. (U. S.) 561; *Interst. Com. Commission v. Detroit, G. H. & M. R. Co.*, 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986, *affg.* s. c. 74 Fed. 803, *revg.* s. c. 57 Fed. 1005; *Interst. Com. Commission v. B. & O. R. Co.*, *supra*; *Ransome v. Eastern R. Co.*, (1857) 1 C. B., N. S. (Eng.) 437. (3) Weight, bulk and convenience of the transportation. (4) The amount of the product or commodity in the hands of a few persons to ship or compete for, recognizing the principle of selling cheaper at wholesale than at retail.—*Interst. Com. Commission v. B. & O. R. Co.*, 145 U. S. 263, 12 Sup. Ct. R. (U. S.) 844, *affg.* s. c. 43 Fed. 37. (5) General public good, including good to the shipper, the railroad company, and the different localities.—*Interst. Com. Commission v. B. & O. R. Co.*, *supra*. (6) Competition.—*Interst. Com. Commission v. L. & N. R. Co.*, 190 U. S. 273, 23 Sup. Ct. R. (U. S.) 687; *East Tenn. V. & G. R. Co. v. Interst. Com. Commission*, 181 U. S. 1, 21 Sup. Ct. R. (U. S.) 516; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 20 Sup. Ct. R. (U. S.) 209, *revg.* s. c. 83 Fed. 898, 71 Fed. 835; *Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45, *affg.* s. c. 74 Fed. 715, 69 Fed. 227; *Texas & P. R. Co. v. Interst. Com. Commission*, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666, *revg.* s. c. 57 Fed. 948, *affg.* s. c. 52 Fed. 187; *Interst. Com. Commission v. B. & O. R. Co.*, *supra*; *Pickering Phipps v. L. & N. W. R. Co.*, (1892) 2 Q. B. D. (Eng.) 229, construing § 2 of the English Act of 1854, which is very like Interst. Com. Act, § 3. None of the above factors alone are to be considered necessarily controlling. Neither are they all controlling as a matter of law. It is a question of fact to be decided in each case by the proper tribunal.—*Interst. Com. Commission v. Ch. G. W. R. Co.*, 141 Fed. 1003.

In determining whether rates fixed by a state yield a reasonable return, a comparison of the actual gross receipts of the railroad from its state business with those which it would have received if the rates prescribed had been in force does not sufficiently determine as to the reasonableness of the rates in question, as the expenses incurred in

producing those receipts must always be taken into account and only by striking a balance between the two can it be determined that the business is profitable.—*Chicago, M & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. R. (U. S.) 336.

In passing upon questions arising under the Interstate Commerce Act, the tribunal appointed to enforce its provisions is empowered to fully consider all the circumstances and conditions which reasonably apply to the situation, and the tribunal may and should consider the legitimate interests as well of the traders and shippers; the competition that affects rates and the strife between routes for traffic; and the welfare of the community which is to receive and consume the commodities, as well as that which produces and ships them.—*Texas & P. R. Co. v. Interst. Com. Commission*, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666, revg. s. c. 57 Fed. 948, affg. s. c. 52 Fed. 187.

Railroad companies contended that if a regulative statute had been in force during any one of the three years preceding its passage, they would have been compelled to use their property for the public substantially without reward or without the just compensation to which they were entitled.—*Held*, that this mode of calculation for ascertaining the probable effect of the statute upon the railroad companies was one that might properly be used.—*Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. R. (U. S.) 418, affg. 64 Fed. 165.

Where two or more statutes regulating rates are passed at various times, they must be considered separately in determining whether they afford adequate compensation to the railroads. The first act must be considered alone, while the subsequent acts must be considered with reference to the reductions made in the earlier act.—*Perkins v. No. Pac. R. Co.*, 155 Fed. 445.

Every pertinent fact or circumstance which would have a tendency to enable the court to arrive at the fair value of the plaintiff's property should be considered in determining the reasonableness of the rates prescribed by a railroad commission.—*Houston & T. C. R. Co. v. Storey*, 149 Fed. 499.

Three factors, chiefly, make the cost of doing local traffic greater: (1) the shortness of the haul; (2) the lightness of the train loads; (3) the expense of billing and handling.—*Northern Pac. R. Co. v. Keyes*, 91 Fed. 47.

In determining whether a rate fixed by statute is insufficient, the compensation to the carrier implies payment of the cost of service, interest on bonds and dividends.—*Southern Pac. Co. v. R. R. Commrs.*, 78 Fed. 236.

It will not be assumed that a reduction in rates will mean a reduction in net or gross revenues.—*Quimby v. Clyde Ss. Co.*, 12 Inters. Com. R., 459.

In determining whether certain advances in rates on livestock from the Southwest in 1903 were reasonable, the Interstate Commerce Commission considered the cost to the carriers at the points of origin and delivery, cost and maintenance of special equipment, expense of unloading and reloading in transit incident to feeding, watering and resting the stock, character of the movement, number of cars in trains and their average loads, volume and desirability of the traffic, return of empty cars, liability to damage, cost of hauling, increased cost of raising livestock, decreased selling price, method of making the advances in rates, disappearance of competition, cost of railroad labor and supplies, improved methods of operation and increasing general traffic, revenue per ton per car per mile and per ton per train per mile, and other relevant circumstances and conditions.—*Cattle Raisers' Assn. v. Mo., K. & T. R. Co.*, 11 Inters. Com. R. 296.

Among the controlling factors in fixing rates is the risk incurred.—*Tift v. So. R. Co.*, 10 Inters. Com. R. 548.

Rates on highly competitive kinds of traffic should not be adjusted with reference to the interests of any particular market, but reasonable and just rates should be established, regardless of the results which may ensue, and the traffic be allowed to go wherever it will under such circumstances.—*Chicago Live Stock Exch. v. Ch. G. W. R. Co.*, 10 Inters. Com. R. 428.

The taxes imposed on railroad property and securities should be taken into account in determining which return is reasonable.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

In determining whether rates are unjust or unreasonable, or whether any locality, person or commodity is subject to undue prejudice, it is entirely appropriate to take into consideration all facts and circumstances which bear upon the relation of rates to different communities.—*Daniels v. Chicago, R. I. & P. R. Co.*, 6 Inters. Com. R. 458.

The increasing or diminishing volume of business, the market price of the articles to be transported, the relation of local to through freights, the articles of freight on which the railroad must depend as compared with other roads transporting similar commodities through more populous communities, the development of competition, the opening of new lines of communication, the course of business which may concentrate empty cars at either terminus of the line, all have a bearing on the making of reasonable rates.—*Buchanan v. No. Pac. R. Co.*, 3 Inters. Com. R. 655, 5 I. C. C. R. 7.

The Interstate Commerce Commission will not order the raising of rates in order to equalize a difference in the cost of production now operating against a complainant.—*Poughkeepsie Iron Co. v. N. Y. C. & H. R. R. Co.*, 3 Inters. Com. R. 248, 4 I. C. C. R. 195.

In determining what is a reasonable rate, the demands of operating expenses, fixed charges, bonded debt, and dividends, are to be considered, but the claim that these fix a standard below which a rate may not be reduced, is subject to qualifications, one of which is that such obligations must have been incurred *bona fide*.—*In re Excessive Rates on Food Products*, 3 Inters. Com. R. 93, 4 I. C. C. R. 48.

The generally recognized rule of transportation that the cost of carriage is usually in inverse ratio to distance, and that, therefore, the rate per ton per mile to be justly charged decreases with distance, is subject to qualifications, such as volume of business, character of route, necessary revenue from the business done.—*Manufacturers' Union v. M. & St. L. R. Co.*, 1 Inters. Com. R. 483, 630, 2 Inters. Com. R. 228, 302, 3 Inters. Com. R. 115, 4 I. C. C. R. 79.

To be taken into consideration in determining what is a reasonable rate for a particular commodity, are the relative amount of through and local business, the proportion borne by the particular commodity to the rest of the local traffic, the market value of the commodity, etc.—*Evans v. Oregon R. & N. Co.*, 1 Inters. Com. R. 314, 326, 641, 1 I. C. C. R. 325.

In determining, under N. Y. R. R. L., § 100, whether a railroad corporation should be permitted to abandon one of its stations, the state Board of Railroad Commissioners may receive in evidence a contract between such corporation and the citizens of the locality as to the erection and maintenance of such station, although they have not been vested by the legislature with the function of granting or withholding relief based upon contractual obligations.—*People ex rel. Loughran v. Board of R. R. Commissioners*, 158 N. Y. 421, 53 N. E. 163, affg. s. c. 32 App. Div. (N. Y.) 158, 52 N. Y. Supp. 901.

The questions of time, place, distance, facilities, quality and quantity of goods, and many other matters, must be considered in determining what is a just and reasonable charge in given circumstances.—*Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, affg. s. c. 68 Hun (N. Y.), 486, 22 N. Y. Supp. 976.

In a suit by a carrier to restrain the enforcement of rates fixed by the legislature, an allegation that the rates are confiscatory, etc., because (1) "the traffic and business over the same is so small and unremunerative that it cannot and has not been able to operate its railway under said statute without an actual loss," and because (2) "of its inability to pay the interest upon its just debts and the cost of maintaining and operating its railroad in a safe and proper condition," is insufficient on demurrer, since the road's business might be so small or its operating expenses so extravagant that no reasonable rate could make its passenger business profitable, and its debts might, by reason of

extravagance or loss from mismanagement, be so large that no reasonable rate would enable the road to pay interest on such debts.—*Missouri Pac. R. Co. v. Smith*, 60 Ark. 221, 29 S. W. 752.

The Georgia railroad commission may, in fixing rates, consider economic conditions existing at various points, and adjust its schedule to meet the same.—*Southern R. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429.

The factors and circumstances stated which should be taken into account in determining what is reasonable compensation for a carrier.—*Boston & W. R. Co. v. Western R. Co.*, 14 Gray (Mass.), 253.

All debts incurred by the directors for a railway corporation, which would be allowed in a suit for taking the account as between them and their *cestuis que trust*, are debts to be paid before profits can be ascertained.—*Corry v. Londonberry & E. R. Co.*, 7 Jurist N. S. Pt. 1 (Eng.) 508.

[39] — Interests of carrier and shipper must be considered.

Investments and expenditures by shippers as justification for discriminatory rates,—see ante, § 31, note [52].

Rates cannot be arbitrarily fixed in the mere discretion of the carrier, but must be adjusted in the interest of the public as well as of the carrier.—*Lehmann v. So. Pac. R. Co.*, 2 Inters. Com. R. 548, 3 Inters. Com. R. 80, 4 I. C. C. R. 1.

The word “reasonable,” as applied to facilities means reasonable for the company as well as the public, and “reasonable facilities” does not mean those furnished at a loss to the carrier.—*Darlaston Local Board v. London & N. W. R. Co.*, 1894, 2 Q. B. D. 694.

[40] — Demurrage charges.

The fair rental value of the car is not the proper basis for computing a demurrage charge, which is rather in the nature of a penalty, to insure that the consignee will not congest traffic by delaying unloading his freight.—*Kehoe v. Charleston & W. C. R. Co.*, 11 Inters. Com. R. 166.

[41] — Consideration of interstate or foreign business in determining as to intrastate rates.

The reasonableness of rates prescribed by a state for transportation within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it.—*Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. R. (U. S.) 418, affg. 64 Fed. 165.

Where rates are prescribed for transportation only within the limits of a state, their reasonableness must be determined without reference to the interstate business done by the carrier, or to the profits derived from that business.—*Seaboard Air L. R. Co. v. R. R. Commission*, 155 Fed. 792.

A state cannot justify unreasonably low rates for domestic transportation considered alone, on the ground that the carrier is earning large profits upon interstate business, over which, so far as the rates are concerned, the state has no control; nor can a carrier justify unreasonably high rates on domestic business on the ground that it will be able, in that way to meet the losses on its interstate business.—*Seaboard Air L. R. Co. v. R. R. Commission*, 155 Fed. 792.

In determining whether local rates fixed by a state commission are unreasonably low, the earnings from the portion of the carrier's interstate traffic which takes place within the state, cannot be taken into account.—*Northern Pac. R. Co. v. Keyes*, 91 Fed. 47.

It is not a defense to an action to restrain an unreasonable rate, that the railroad operates also in states where rates are not fixed by law and so the road can make a reasonable profit on all its business. Robbing Peter to pay Paul has never received judicial sanction.—*Chicago & N. W. Ry. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744n.

In ascertaining the reasonableness of rates fixed by a commission, interstate and foreign business should be considered in determining the proportion of the value of the property assignable to domestic business, but no part of the earnings or loss from interstate or foreign business can be charged to or against the income account of the company.—*State v. Seaboard Air L. R. Co.*, 48 Fla. 129, 37 So. 314; *affd.* 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109.

In fixing the rates for intrastate transportation, it is proper for a state railroad commissioner to include in his computation the amount of the interstate fares collected by the portion of the road lying within the state.—*Commissioner of Railroads v. Wabash R. Co.*, 126 Mich. 113, 85 N. W. 466, *affg. s. c.* 123 Mich. 669, 82 N. W. 526.

[42] — Consideration of joint rates and the division thereof.

In deciding as to the reasonableness of a rate on shipments over two or more railroads, it is competent for the Interstate Commerce Commission or the courts to consider the through rate, however composed.—*Illinois Cent. R. Co. v. Interst. Com. Commission*, 206 U. S. 441, 27 Sup. Ct. R. (U. S.) 700.

Where two connecting carriers unite in putting in force a joint through tariff between given points, such joint tariff is not the standard by which the reasonableness under Interstate Commerce Act, §§ 3, 4,

of the local tariff on either line is to be determined.—*Parsons v. Ch. & N. W. R. Co.*, 63 Fed. 903; *affd.* 167 U. S. 447, 17 Sup. Ct. R. (U. S.) 887.

The apportionment of a rate to different parts of a through line does not determine the charge to the public, but it may be significant on the question of a reasonable rate for the whole distance.—*James v. C. P. R. Co.*, 4 Interst. Com. R. 45, 110, 274, 5 I. C. C. R. 612; *Brady v. Pa. R. Co.*, 2 I. C. C. R. 131, 2 Inters. Com. R. 78.

For purposes of rates, the several auxiliary roads should not be looked on as wholly independent lines which may separately establish rates looking only to a satisfactory ledger account of each separate road. A rate for continuous transportation over a route consisting of the main line and a branch is one entire charge, and how it may be divided or apportioned among the constituent corporations is not important to the public, which is concerned with the reasonableness of the total rate. *Delaware Grange v. N. Y. P. & N. R. Co.*, 3 Inters. Com. R. 554, 4 I. C. C. R. 588.

What division of joint rates is made by the carriers, is not without significance in determining what are reasonable rates for the whole distance on the lines in question.—*R. R. Com. of Florida v. Savannah F. & W. R. Co.*, 3 Inters. Com. R. 414, 688, 5 I. C. C. R. 13.

The through rate and the divisions of such through rate between the carriers, furnish no fair or just criterion for the intermediate local rates on the same line. Other considerations besides mere mileage may legitimately be taken into account.—*McMorran v. Grand Trunk R. Co.*, 2 Inters. Com. R. 604, 3 I. C. C. R. 252.

[43] — Consideration of entire system.

When by legislation and consolidation, a railroad which was originally all in one state becomes a part of a system or line embracing roads in other states, and the state originally incorporating it enacts laws to regulate the rates on the consolidated road within its borders, the proper test as to the reasonableness of these rates is their effect upon the consolidated line as a whole.—*St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. R. (U. S.) 484, *affg.* s. c. 54 Ark. 101, 15 S. W. 18.

In deciding whether rates fixed by legislative authority deprive a railroad of property without due process of law, courts do not rest their judgment on one set of rates for specific articles, but they take into consideration all the rates on all articles, and decide whether, as a whole, the result is unreasonable.—*Matthews v. Board of Corp. Comrs.*, 106 Fed. 7.

The reasonableness of the passenger fare upon a particular part of a carrier's system must be determined with some reference to the system as a whole.—*Artz v. Seaboard Air L. R. Co.*, 11 Inters. Com. R. 458.

[44] — Money invested in enterprise.

The amount actually and necessarily invested in the enterprise is to be considered in determining as to reasonableness of rates.—*Milwaukee Elect. R. & L. Co. v. Milwaukee*, 87 Fed. 577.

The money actually invested in a railway is not a basis on which the proper return may be calculated.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

[45] — Capitalization improper basis.

If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged.—*Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. R. (U. S.) 418, affg. s. c. 64 Fed. 165.

The capitalization of a railroad is not a basis on which a proper return may be calculated.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

Those who have conceived and executed a railroad enterprise have no right to exact a return upon an extravagant capitalization.—*Danville v. So. R. Co.*, 8 Inters. Com. R. 409.

To make the capital account of our railroads the measure of their legitimate earnings would place, as a rule, the corporation which has been honestly managed from the outset under enormous disadvantages.—*Grain Shippers' Assn. v. Ill. Cent. R. Co.*, 8 Inters. Com. R. 158.

[46] — Present value as proper basis.

The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a public highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. In order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, the sum required to meet operating expenses, are all matters for considera-

tion, to be given such weight as may be just and right in each case.—*Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. R. (U. S.) 418, affg. s. c. 64 Fed. 165.

The basic fact which furnishes the test of the reasonableness of a rate is the value of the property devoted to the public use.—*Louisville & N. R. Co. v. R. R. Comm.*, 157 Fed. 944.

The basis of all calculations as to the reasonableness of rates charged must be the fair value of the property being used by it for the convenience of the public.—*Seaboard Air L. R. Co. v. R. R. Commission*, 155 Fed. 792.

In estimating the value of the property of a railroad, the estimate must not be based on what was its value in the past, nor what it cost, nor what it would cost to duplicate it, nor its probable future value, but must be based on its present value.—*Matthews v. Board of Corp. Comrs.*, 106 Fed. 7.

The basis of calculations as to the reasonableness of rates is not the cost of the railroad, but its value as a producing factor, taking into consideration its location, the character of the country through which it passes, and the reasonable expectation of business coming to it.—*Matthews v. Board of Corp. Comrs.*, 106 Fed. 7.

The method of arriving at a true and just valuation upon which to figure local earnings is to ascertain what per cent. the local earnings constitute of the gross income, and to take the same per cent. of the total value of its property in the state as the capital stock which is invested to produce the local earnings.—*Ch. M. & St. P. R. Co. v. Tompkins*, 90 Fed. 363; explained, 91 Fed. 47.

The value of a railway system does not depend on the mere cost of its embankment or equipment. It is rather a question of location, by connections, of terminal facilities, of enterprises along its line.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

The value of the entire property of a railroad employed for the public convenience can shed but little light on the question whether the rate upon a single commodity yields its proper proportion of a fair return on that value.—*Central Y. P. Assn. v. Ill. Cent. R. Co.*, 10 Inters. Com. R. 505.

The fact that the business is established is material in determining the value of the plant of a public service corporation.—*Cedar Rapids W. Co. v. Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081; *Brunswick W. Dist. v. Water Co.*, 99 Me. 371, 59 Atl. 537.

The faithfulness or unfaithfulness of a public service corporation in the performance of its public duty has no bearing upon the present value of its property.—*Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

In ascertaining the value of the property of a water company, preparatory to condemnation of the same, the "property" includes the real estate or other property, if any, not connected with the water system, the plant or physical system, and all franchises except the franchise to be a corporation.—*Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

The pecuniary value of the property of a public service corporation depends, to a considerable extent, upon the financial returns it can be made to yield to the stockholders.—*Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

The basis of all calculations as to the reasonableness of rates to be charged by a public service corporation is the fair value of the property used by it for the convenience of the public.—*Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

The value of the plant and franchises of a corporation is affected by the character and duration of the franchises.—*Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

[47] — Cost of construction or reproduction.

Not to be included in operating expenses of single year,—see post, note [52].

The cost of reproducing railway property is not an exclusive guide to the return which should be allowed.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

In ascertaining the reasonableness of rates fixed by a commission, the cost of constructing the road is not to be deducted from the earnings under the proposed rates, but is only a factor to be considered in determining the fair value of the company's property.—*State v. Seaboard Air L. R. Co.*, 48 Fla. 129, 37 So. 314; *affd.* 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109.

A fair rate of interest upon the money invested in the plant of a public service corporation during construction and before completion, is as much a part of the cost of construction as is the money itself which is expended for materials and labor.—*Brunswick Water Dist. v. Water Co.*, 99 Me. 371, 59 Atl. 537.

The cost of present reproduction is evidence of the strongest character in determining the value of the property of a public service corporation.—*Brunswick Water Dist. v. Water Co.*, 99 Me. 371, 59 Atl. 537.

Evidence of the cost of reproduction of a plant is some evidence of its present value.—*Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

The actual cost of a plant, together with proper allowances for depreciation is competent, but not conclusive, evidence of the present value

of the same.—*Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

The court cannot assume that the cost of reproduction of a line of railway, or that the present as compared with its original cost of construction, is the amount of stock and bonds outstanding, or what the road has cost up to the time of trial.—*State v. Minneapolis & St. L. R. Co.*, 80 Minn. 191, 83 N. W. 60; *affd.* 186 U. S. 257, 22 Sup. Ct. R. (U. S.) 900.

[48] — Depreciation.

In determining whether given rates fixed by law yield a reasonable return, it is proper to take into account the depreciation in the road and rolling stock.—*Perkins v. No. Pac. R. Co.*, 155 Fed. 445.

[49] — Losses of traffic from new routes.

In determining whether rates fixed by legislative authority are confiscatory, the stockholders are not the only ones whose rights and interests are to be considered. If the establishment of new lines of transportation causes a diminution in the total tolls collected, that is not, in itself, a sufficient reason why the corporation, in an effort to recoup, should be permitted to maintain rates that are unjust to those who must or do use its property. The public cannot properly be subjected to excessive and unreasonable rates simply that the stockholders may earn dividends.—*Covington & L. Turnpike Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. R. (U. S.) 198, *revg.* s. c. 14 Ky. L. R. 689, 20 S. W. 1031.

[50] — Leases.

It is erroneous to include in the basis of assessment against an elevated railroad company the cost of leases of roads operated by it, without deducting the value of the franchises included in the leases.—*People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 417, 46 N. E. 875.

[51] — Stock, bonds, etc.

Preferred stock cannot be considered as indebtedness, warranting the relieving of a carrier from any duty otherwise to be imposed.—*St. John v. R. Co.*, 22 Wall. (U. S.) 136.

In considering whether rates fixed by statute yield a reasonable return, outstanding debentures and preferred stock are considered to be of much the same nature as bonds or securities.—*Perkins v. No. Pac. R. Co.*, 155 Fed. 445.

The value of the stock and bonds which a corporation has outstanding may be considered in determining the reasonableness of rates.—*Houston & T. C. R. Co. v. Storey*, 149 Fed. 499.

The interest upon an honest bonded debt of a railroad, incurred in a careful, economical and efficient administration of its affairs, is a fixed charge, which the company is entitled to earn before any reductions in its earnings can be compelled by the state.—*Chicago, M. & St. P. R. Co. v. Smith*, 110 Fed. 473.

That stock was issued as a part of a reorganization scheme and is still outstanding, does not necessarily require that rates shall be such as to earn fair returns on such capitalization.—*Danville v. So. R. Co.*, 8 Inters. Com. R. 571.

The preferred stock of a railroad corporation is not an indebtedness which can be considered in determining whether it would be confiscatory to require such railroad to operate separate freight and passenger trains.—*People v. St. L. A. & T. H. R. Co.*, 176 Ill. 512, 52 N. E. 292.

[52] — Operating expenses.

Cost of service rendered as affecting rates,—see post, note [54].

Expenditures in improvements as justification for advances in rates,—see ante, § 26, note [39].

Unnecessary cost of operation not permitted to excuse unlawful discriminations,—see ante, § 31, note [48].

Expenditures for additions to construction and equipment should be reimbursed by all the traffic they accommodate during the period of their duration, and improvements which will last many years should not be charged wholly against the revenue of a single year.—*Illinois Cent. R. Co. v. Interst. Com. Commission*, 206 U. S. 441, 27 Sup. Ct. R. (U. S.) 700.

The cost of doing a carrier's local business may be approximated by ascertaining the relation of the cost of doing the entire business of a railroad to its gross income, and then applying that proportion to the total proceeds of the carrier's local business.—*No. Pac. R. Co. v. Keyes*, 91 Fed. 47.

Ordinary repairs and replacements of a railroad are to be included under the item of "operating expenses."—*Metropolitan Trust Co. v. Houston & T. C. R. Co.*, 90 Fed. 683.

The power of a state to fix rates cannot be thwarted by the sum which a railroad may see fit to charge to operating expenses or outstanding indebtedness.—*Chicago, M. & St. P. R. Co. v. Tompkins*, 90 Fed. 363; explained, 91 Fed. 47; revd. on other grounds, 176 U. S. 167, 20 Sup. Ct. R. (U. S.) 336.

Cost of operation and maintenance of the road is to be considered in determining as to the reasonableness of rates.—*Milwaukee Elect. R. &*

L. Co. v. Milwaukee, 87 Fed. 577; *In re Excessive Rates on Food Products*, 3 Inters. Com. R. 93, 4 I. C. C. R. 48; *Evans v. Oregon R. & N. Co.*, 1 Inters. Com. R. 314, 326, 641, 1 I. C. C. R. 325.

“Operating expenses” of a railroad include those improvements which are necessary for keeping the road in a serviceable condition, such as the replacing of rails, bridges, etc., but exclude improvements in the nature of extensions of the road.—*Southern Pac. Co. v. R. R. Comrs.*, 78 Fed. 236.

In an action in which the question was whether a statute fixing a maximum rate on a railroad allowed a sufficient return to the company, a deficit in operating a road leased from another company is not properly considered a part of operating expenses where it appears that the deficit resulted merely from the advancing by the lessee to the lessor of funds to pay interest on the lessor’s bonds, it being assumed that the lessor and the security are good.—*Southern Pac. Co. v. R. R. Comrs.*, 78 Fed. 236.

Expenditures for permanent improvements and for equipment, made in a single year, should not be taxed as part of the year’s current operating expenses, and should be, so far as practicable, “projected proportionally over the future.”—*Central Y. P. Assn. v. Ill. Cent. R. Co.*, 10 Inters. Com. R. 505; *Tift v. So. R. Co.*, 10 Inters. Com. R. 548.

Improvements projected or required, such as the elevation of tracks, abolition of grade crossings, etc., increase the amount on which dividends must be earned without enlarging the capacity to earn them; and should be taken into account in determining what return is reasonable.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

The cost of the service in railway transportation is the expense of the two terminals and the intermediate haul, and the terminal expenses remain the same without regard to the length of the haul.—*Board of Trade v. Ala. Mid. R. Co.*, 6 Inters. Com. R. 1.

In estimating the operating expenses of a railroad, stock dividends cannot be included.—*State v. Minneapolis & St. L. R. Co.*, 80 Minn. 191, 83 N. W. 60; *affd.* 186 U. S. 257, 22 Sup. Ct. R. (U. S.) 900.

[53] — Earnings and general financial condition of road.

Need of revenue by carrier as justifying discriminatory rates,—see ante, § 31, note [42].

Failure to pay expenses as justification of discriminatory rates,—see ante, § 31, note [50].

Financial necessity as justifying violations of long and short haul rule,—see ante, § 36, note [27].

That the total receipts of a carrier from local freight rates are less than the cost of doing such business does not justify it in an inequality of rates between different portions of the state, or prevent the commission from insisting that the lower rate be the uniform rate.—*Seaboard Air L. R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, affg. s. c. 48 Fla. 129, 37 So. 314, and 48 Fla. 150, 37 So. 658.

The “earnings” of a railroad include all the receipts arising from its operations as a railroad company, but not those from public lands granted, nor fictitious receipts from the transportation of its own property. “Net earnings” are the excess of gross earnings over all the ordinary expenses of organization and of operating the road, and expenditures made *bona fide* in improvements, and paid out of earnings, and not by the issue of bonds or stock; but not deducting interest paid on any of the bonded debt of the company.—*Union Pac. R. Co. v. U. S.* 99 U. S. 402; followed and elaborated in *U. S. v. Kan. Pac. R. Co.*, 99 U. S. 455, revg. s. c. Fed. Cases, No. 15,505.

The defendant railroad was unfinished, had not made through connections, was being compelled by state legislation to expend large sums on its equipment, was not extravagantly managed, was not maintaining excessive fixed charges, was paying salaries to only two of its officers, and yet its income was barely sufficient to pay its operating expenses.—*Held*, that it should not be compelled, under these circumstances, to transport interstate passengers at the same rates per mile as are completed and prosperous roads.—*Railroad Commission of Ark. v. St. L. & N. Ark. R. Co.*, 12 Inters. Com. R. 269.

While the financial condition of a railroad does not justify it in violating the Interstate Commerce Act, it is a reason why the Interstate Commerce Commission should carefully consider what the effect of its order would be on the revenues of the company.—*Board of Trade v. Nashville, C. & St. L. R. Co.*, 8 Inters. Com. R. 503.

While the demands upon a road and its earnings must be considered and receive due weight in the determination of the reasonableness of rates, they are not controlling to the extent that independent of all other circumstances rates are never unreasonable until the earnings are sufficient to operate the road and meet all the obligations of the company.—*Jerome Hill Colton Co. v. Mo. K. & T. R. Co.*, 6 Inters. Com. R. 601.

The earnings of the road are to be considered in determining what is a reasonable rate for a particular commodity.—*Evans v. Oregon R. & N. Co.*, 1 Inters. Com. R. 314, 326, 641, 1 I. C. C. R. 325.

That a road earns little more than operating expenses is to be considered in determining what rates would be reasonable, but it cannot

justify grossly excessive rates.—*N. O. Cotton Exch. v. C. N. O. & T. P. R. Co.*, 1 Inters. Com. R. 648, 2 Inters. Com. R. 289, 2 I. C. C. R. 375.

The actual earnings of a company have evidentiary value in determining the value of the company's plant and franchises.—*Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

In estimating the gross earnings of passenger trains, there should be included the earnings from the passenger fares, express, baggage and mails.—*Commissioner of Railroads v. Wabash R. Co.*, 123 Mich. 669, 82 N. W. 526; *affd.* 126 Mich. 113, 85 N. W. 466.

[54] — Value and cost of service rendered.

Value of service to shipper as factor in determining as to proper classifications,—see ante, § 28, note [34].

Cost of carrying as justifying violations of long and short haul rule,—see ante, § 36, note [26].

The cost of service to the carrier is a circumstance to be considered in rate making.—*Western U. Tel. Co. v. Call Co.*, 181 U. S. 92, 21 Sup. Ct. R. (U. S.) 561; *Interst. Com. Commission v. Detroit, G. H. & M. R. Co.*, 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986; *Interst. Com. Commission v. B. & O. R. Co.*, 43 Fed. 37; *affd.* 145 U. S. 263, 12 Sup. Ct. R. (U. S.) 844; *Cattle Raisers' Assn. v. Mo. K. & T. R. Co.*, 11 Inters. Com. R. 296; *Ransome v. Eastern R. Co.*, (1857) 1 C. B., N. S. (Eng.) 437.

In determining what is a reasonable rate, the value of the property employed and the expenses of operation should be considered.—*Metropolitan Trust Co. v. Houston & T. C. R. Co.*, 90 Fed. 683; *Chicago, I. & L. R. Co. v. Hunt*, — Ind. App. —, 79 N. E. 927.

The value of the service to the shipper is relevant in fixing a rate.—*Interst. Com. Commission v. B. & O. R. Co.*, 43 Fed. 37; *affd.* 145 U. S. 263, 12 Sup. Ct. R. (U. S.) 844.

The cost of the service is not a conclusive method of arriving at the reasonableness of a rate.—*Society Am. Florists v. U. S. Exp. Co.*, 12 Inters. Com. R. 138.

In adjusting rates, the cost of the service to the carrier should not be given such weight as to leave out of consideration the value of the service to the shipper.—*Planters' Compress Co. v. C. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 382; *affd.* and applied, *Planters' Compress Co. v. Mo. K. & T. R. Co.*, 11 Inters. Com. R. 606.

The adjustment of rates on different articles on the basis of comparative cost to the carrier is not a proper method.—*Planters' Compress Co. v. C. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 382; *affd.* and applied, *Planters' Compress Co. v. Mo. K. & T. R. Co.*, 11 Inters. Com. R. 606.

Cost of handling is to be considered in fixing rates.—*Tift v. So. R. Co.*, 10 Inters. Com. R. 548.

A higher rate for a special service, such as the moving of perishable freight, should bear an equitable relation to the value of the service to the traffic, and it cannot be fixed arbitrarily by the carrier.—*Delaware Grange v. N. Y. P. & N. R. Co.*, 3 Inters. Com. R. 554, 4 I. C. C. R. 588.

Rates should bear a reasonable relation to the cost of producing the commodity and the value of the service to the producer and shipper, but should not on that account be so low as to put burdens on other traffic.—*In re Excessive Rates on Food Products*, 3 Inters. Com. R. 93, 4 I. C. C. R. 48.

The value of the service, as well as its cost, is to be considered in determining what would be a reasonable rate.—*Thurber v. N. Y. C. & H. R. R. Co.*, 1 Inters. Com. R. 397, 648, 2 Inters. Com. R. 472, 3 I. C. C. R. 473.

The reasonableness of a rate is tested not by the value of the service to the person receiving the service, but by the return it gives to the carrier. No commission could fix a rate on the basis of value of the service as the value must necessarily be constantly varying and would differ even between consignees at the same point.—*Clyde v. Richmond & D. R. Co.*, 57 Fed. 436.

The superiority of express service over ordinary railroad freight service in the respects of speedy collection, transportation and delivery, justifies the imposing of rates reasonably higher than those imposed for ordinary freight service.—*Herendeen v. U. S. Exp. Co.* Decided by the N. Y. Public Service Commission of the Second District, February 18, 1908.

A public service corporation can demand no greater compensation than the services rendered are reasonably worth to the public as individuals and not in the aggregate.—*Brunswick Water Dist. v. Water Co.*, 99 Me. 371, 59 Atl. 537; *Kennebec Water Dist. v. Waterville*, 97 Me. 185. 54 Atl. 6, 60 L. R. A. 856.

[55] — Risks of the enterprise.

While it is true that the fair value of the property used by a public service corporation is the basis of calculation as to the reasonableness of rates, this is not the only element of calculation. There must be consideration for, among other things, the risks of the incipient enterprise on the one hand, and whether all the property used is reasonable necessary to the service and whether as a structure it is unreasonably expensive, on the other.—*Brunswick Water Dist. v. Water Co.*, 99 Me. 371, 59 Atl. 537.

Those who invest in hazardous enterprises may reasonably be entitled, for a time at least, to larger returns than would be the case if means in the enterprise were assured from the beginning, and therefore the risk of the enterprise may be considered in determining what are reasonable rates.—*Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

[56] — Cost and value of article transported.

Advance in price of commodity carried as justification for advance in rates,—see ante, § 26, note [39].

Value of property carried as bearing on proper classification,—see ante, § 28, note [34].

Cost or value of articles carried as justifying discriminatory rates,—see ante, § 31, note [43].

Differences in value of goods carried as justifying violations of long and short haul rule,—see post, § 36, note [25].

The value of the goods shipped is a relevant fact in fixing a rate.—*Interst. Com. Commission v. B. & O. R. Co.*, 43 Fed. 37; *affd.* 145 U. S. 263, 12 Sup. Ct. R. (U. S.) 844; *Tift v. So. R. Co.*, 10 Inters. Com. R. 548; *Central Y. P. Assn. v. Ill. Cent. R. Co.*, 10 Inters. Com. R. 505; *Buchannan v. No. Pac. R. Co.*, 3 Inters. Com. R. 655, 5 I. C. C. R. 7; *Evans v. Oregon R. & N. Co.*, 1 Inters. Com. R. 314, 326, 641, 1 I. C. C. R. 325.

Differences in cost of manufacture afford no grounds for action by the Interstate Commerce Commission in determining relatively reasonable rates.—*Phillips Co. v. Grand Trunk W. R. Co.*, 11 Inters. Com. R. 659.

In determining what the relation should be between the rates for transporting two different articles of freight, value is an important factor, not alone because of the greater risk connected with the transportation of the more valuable article, but because of its bearing upon the value to the shipper of the service rendered in transportation.—*Chicago Live Stock Exch. v. Ch. G. W. R. Co.*, 10 Inters. Com. R. 428.

In the carriage of great staples, which supply an enormous business, and which in market value and actual cost of transportation are among the cheapest articles of commerce, rates yielding only a moderate profit to the carrier are both necessary and justifiable.—*National Hay Assn. v. L. S. & M. S. R. Co.*, 9 Inters. Com. R. 264.

Value is an important element in the fixing of rates, but it cannot be made an arbitrary standard independent of all other considerations.—*Grain Shippers' Assn. v. Ill. Cent. R. Co.*, 8 Inters. Com. R. 158.

A greater value of a product transported justifies the exaction of a higher rate than that exacted for the transportation of an article of less value.—*Truck Farmers' Assn. v. Northeastern R. Co.*, 6 Inters. Com. R. 295.

Differences in value of finished and unfinished bedroom sets and the greater tonnage per carload which can be carried of the latter, together with other factors affecting the interests of both carrier and shipper, require that the rate on the unfinished product shall not exceed 85 per cent. of the rates on the finished.—*Potter Mfg. Co. v. Ch. & G. T. R. Co.*, 4 Inters. Com. R. 223, 5 I. C. C. R. 514.

Rates for any service by the carrier cannot be fixed arbitrarily but should bear a fair and reasonable relation to the antecedent average cost of the traffic as delivered to the carrier for transportation, and the average market price the freight will command.—*Delaware Grange v. N. Y. P. & N. R. Co.*, 3 Inters. Com. R. 554, 4 I. C. C. R. 588.

Rates should bear a reasonable relation to the cost of producing the commodity and the value of the service to the producer and shipper, but should not on that account be so low as to put burdens on other traffic.—*In re Excessive Rates on Food Products*, 3 Inters. Com. R. 93, 4 I. C. C. R. 48.

[57] — Remunerativeness of business of shipper.

The fact that the business of producing certain commodities has become unusually prosperous and remunerative will not justify an advance in rates for transportation of the same which are already reasonably high.—*Central Y. P. Assn. v. Ill. Cent. R. Co.*, 10 Inters. Com. R. 505.

[58] — Interest of complainant.

In passing upon a complaint, the Interstate Commerce Commission will take into consideration the fact that the complainant is not a shipper, producer, or purchaser of the commodity with which the complaint deals, but that the relief is sought only to make conditions more favorable to the use of a compress machine sold solely by complainant.—*Planters' Compress Co. v. C. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 382; *affd.* and *applied*, *Planters' Compress Co. v. Mo. K. & T. R. Co.*, 11 Inters. Com. R. 606.

[59] — Tonnage and volume of traffic.

Increased volume of traffic no justification for advances in rates,—see ante, § 26, note [39].

Volume of traffic to be considered in determining as to proper classifications,—see ante, § 28, note [34].

Amount of freight shipped as justification for discriminations in rates,—see ante, § 31, note [44].

Amount shipped as justification for discrimination in facilities,—see ante, § 32, note [16].

Volume of business is to be considered in rate making.—*Northern Pac. R. Co. v. Keyes*, 91 Fed. 47; *Cattle Raisers' Assn. v. Mo. K. & T. R. Co.*,

11 Inters. Com. R. 296; *Tift v. So. R. Co.*, 10 Inters. Com. R. 548; *Central Y. P. Assn. v. Ill. Cent. R. Co.*, 10 Inters. Com. R. 505; *Buchanan v. No. Pac. R. Co.*, 3 Inters. Com. R. 655, 5 I. C. C. R. 7.

The general rule is, the greater the tonnage of an article of traffic, the lower is the rate.—*Central Y. P. Assn. v. Ill. Cent. R. Co.*, 10 Inters. Com. R. 505.

In the carriage of great staples, which supply an enormous business, and which in market value and actual cost of transportation are among the cheapest articles of commerce, rates yielding only a moderate profit to the carrier are both necessary and justifiable.—*National Hay Assn. v. L. S. & M. S. R. Co.*, 9 Inters. Com. R. 264.

The total charge for a carload of large tonnage should be greater than for a carload of less tonnage, but other things being equal the rate per cwt. should be less in the former case.—*Murphy Co. v. Wabash R. Co.*, 3 Inters. Com. R. 649, 725, 5 I. C. C. R. 122.

[60] — Bulk of commodity carried.

Bulk of commodity carried as bearing on question of proper classification,—see ante, § 28, note [34].

Differences in bulk of goods carried as justifying violations of long and short haul rule,—see ante, § 36, note [25].

The bulk of a commodity is a matter to be considered in rate making.—*Interst. Com. Commission v. B. & O. R. Co.*, 145 U. S. 263, 12 Sup. Ct. R. (U. S.) 844, affg. s. c. 43 Fed. 37.

As a general rule, the fact that a commodity occupies more space to a given weight than another is a ground for making the rate on the former higher than on the latter, leaving out of the calculation the further fact that the greater the weight carried, the greater is the consumption of fuel and wear and tear on rolling stock and the track.—*Truck Farmers' Assn. v. Northeastern R. Co.*, 6 Inters. Com. R. 295.

[61] — Distance.

Where an assessing board is charged with the duty of valuing a certain number of miles of railroad within the state forming part of a line of road running into another state, it may assess those miles of road at their actual cash value determined on a mileage basis, as this is not placing a burden upon interstate commerce, beyond the power of the state, simply because the value of that railroad is created partly by interstate commerce which it is doing.—*Cleveland, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. R. (U. S.) 1122, affg. s. c. 133 Ind. 513, 33 N. E. 421.

Mileage, while a circumstance to be considered along with all the other facts, is by no means decisive, or the most important, in determining the reasonableness of rates.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

In many cases, even on the same road, the relation of rates as between different points cannot be fixed altogether upon relative distance.—*Cannon v. Mobile & O. R. Co.*, 11 Inters. Com. R. 537.

In the absence of other influences, distance is a controlling element in determining what is a reasonable rate—*Freight Bureau v. C. N. O. & T. P. R. Co.*, 7 Inters. Com. R. 180; *Hill v. N. C. & St. L. R. Co.*, 6 Inters. Com. R. 343.

Charges for distances greatly dissimilar need not be proportioned to the relative distances.—*Eau Claire v. Ch. M. & St. P. R. Co.*, 3 Inters. Com. R. 174, 314, 4 Inters. Com. R. 65, 5 I. C. C. R. 264.

While distance is not always the controlling element in determining what rate is reasonable, there is ordinarily no better measure of the carrier's service.—*James v. E. Tenn. V. & G. R. Co.*, 2 Inters. Com. R. 436, 490, 609, 3 I. C. C. R. 225.

That rates are not on a mileage basis does not make them necessarily unreasonable.—*La Crosse M. & J. Un. v. Chicago, M. & St. P. R. Co.*, 2 Inters. Com. R. 9, 1 I. C. C. R. 629.

The ratio of rates should generally decrease with increase of distance, but modifying circumstances often exist.—*Lincoln Board of Trade v. Burl. & Mo. R. Co.*, 1 Inters. Com. R. 647, 2 Inters. Com. R. 95, 2 I. C. C. R. 147.

The mileage basis of adjusting rates is not necessarily the most reasonable—*N. O. Cotton Exch. v. C. N. O. & T. P. R. Co.*, 1 Inters. Com. R. 648, 2 Inters. Com. R. 289, 2 I. C. C. R. 375.

Mileage as a basis for determining the comparative reasonableness of rates has been recognized in England as entirely impracticable, since 1872. The argument against it was strongly stated in that year: (a) It would prevent railway companies from lowering their fares and rates so as to compete with traffic by sea, by canal, or by a shorter or otherwise cheaper railway, and would thus deprive the public of the benefit of competition and the company of a legitimate source of profit. (b) It would prevent railway companies from making perfectly fair arrangements for carrying at a lower rate than usual goods brought in large and constant quantities, or for carrying for long distances at a lower rate than for short distances. (c) It would compel a company to carry for the same rate over a line which has been very expensive in

construction, or which, from gradients or otherwise, is very expensive in working, at the same rate at which it carries over less expensive lines. In short, to impose equal mileage on the companies would be to deprive the public of the benefit of much of the competition which now exists or has existed; to raise the charges on the public in many cases where the companies now find it to their interest to lower them; and to perpetuate monopolies in carriage, trade and manufacture in favor of those routes and places which are nearest and less expensive, where the varying charges of the companies now create competition.—*Ransome v. Railway Co.*, 1 Nev. & McN. (Eng.) 63.

[62] — Rate per ton per mile.

In view of the difficulty of ascertaining the cost of transporting a single article, in order to ascertain the reasonableness of a rate prescribed, it is sometimes necessary to accept as a basis the average rate of all transportation per ton per mile.—*Atlantic C. L. R. Co. v. Florida*, 203 U. S. 256, 27 Sup. Ct. R. (U. S.) 108, affg. s. c. 48 Fla. 146, 37 So. 657.

That the rate per ton mile of the entire business of the carriers is much less than the rate per ton mile on local business under the rates fixed by a state commission, does not establish the reasonableness of the latter rates, for the rate per mile obviously decreases as the length of the haul increases.—*Northern Pac. R. Co. v. Keyes*, 91 Fed. 47.

The rate per ton per mile is not always the measure of a reasonable rate, but is always valuable as affording a basis of comparison for relative rate burdens.—*Farrar v. So. R. Co.*, 11 Inters. Com. R. 640.

The rate per ton per mile, while often instructive, is not by any means a fair index of a reasonable rate.—*Matter of Proposed Advances in Freight Rates*, 9 Inters. Com. R. 382.

The well-known principle that while the aggregate rate should increase, the rate per ton per mile should decrease, as distance increases, is not a rule required by statute, and is subject to qualifications and exceptions.—*Hilton L. Co. v. Wilmington & W. R. Co.*, 9 Inters. Com. R. 17.

Rates for the terminal portion of a through haul, which are a continuation of mileage rates to the end of the haul, are, in the absence of exceptional conditions, reasonable and proper.—*Board of Trade v. Nashville, C. & St. L. R. Co.*, 8 Inters. Com. R. 503.

Distance is undoubtedly a factor, and perhaps ought to be a much more important factor, in the determination of rates, but where the distances in dispute vary from 100 to 1,000 miles, any attempt to adjust

those rates on the sole basis of the rate per ton per mile would be impracticable.—*Board of R. R. Comrs. v. A. T. & S. F. R. Co.*, 8 Inters. Com. R. 304.

The rate per ton per mile rule brings rates down to the narrowest point of scrutiny, and for that purpose is valuable; but it excludes consideration of other circumstances and conditions which enter into the making of rates, no matter how compulsory or imperious they may be, and it cannot, therefore, be accepted as controlling in determining the reasonableness of rates.—*Gustin v. A. T. & S. F. R. Co.*, 8 Inters. Com. R. 277; *Business Men's Assn. v. Ch. St. P. M. & O. R. Co.*, 2 Inters. Com. R. 41, 2 I. C. C. R. 52.

The charge per ton per mile need not, as an absolute rule, diminish with distance.—*Manufacturers', etc., Union v. Minneapolis & St. L. R. Co.*, 1 Inters. Com. R. 483, 630, 2 Inters. Com. R. 228, 3 Inters. Com. R. 115, 4 I. C. C. R. 79.

[63] — Manner in which rates were brought about.

On an investigation as to the reasonableness of rates for the transportation of coal, contracts between railroad companies and certain coal companies which proposed the construction of a competing railroad, whereby the said railroads purchased the collieries, are relevant evidence.—*Interst. Com. Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. R. (U. S.) 563.

The fact that an advance in rates is the result of the joint and concerted action of several railroads may properly be considered as bearing upon the reasonableness and validity of such advance.—*Tift v. So. R. Co.*, 10 Inters. Com. R. 548.

It is incumbent upon the Interstate Commerce Commission when the unreasonableness of rates is in issue before it, to consider how those rates were brought about—whether they are the product of untrammelled competition or the result of a concert of action or combination between the carriers establishing and maintaining them.—*Central Y. P. Assn. v. Ill. Cent. R. Co.*, 10 Inters. Com. R. 505.

[64] — Past conditions not controlling.

In matters of rates one case seldom an exact precedent for another, — see ante, § 20, note [1].

The determination whether rates in question would allow a reasonable return depends, in the final analysis, on the present and future, rather than the past financial and traffic situation of the carrier.—*Grain Shippers' Assn. v. Ill. Cent. R. Co.*, 8 Inters. Com. R. 158.

[65] — Comparison with other rates, etc.

Comparison with other classifications as method of determining as to proper classification,—see ante, § 28, note [34].

Comparisons with other rates,—see also ante, § 31, note [28].

Through rates as standards of comparison,—see ante, § 31, note [71].

Through rate not basis for determining whether local rate violates long and short haul rule,—see ante, § 36, note [22].

Comparisons between the rates of two states are of little value, unless all the elements that enter into the problem are presented.—*Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. R. (U. S.) 418, affg. 64 Fed. 165.

That the cost of carriage of all coal upon an entire railroad system, is a certain per cent. of the gross receipts from all coal, does not warrant the commission in concluding that upon a particular line or part of the system the cost of carriage bears the same ratio to the coal receipts of that particular line or part.—*Interst. Com. Commission v. Lehigh V. R. Co.*, 74 Fed. 784.

Under Interst. Com. Act, § 1, the question is whether a given rate is, in and of itself, unreasonable and unjust. Except as evidentiary circumstances, rates to other places are irrelevant, unless there is a showing that conditions are substantially similar.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

While the revenue per ton per mile over other routes on other lines and to other destinations is often suggestive in arriving at a proper estimate of the reasonableness of a rate over a route complained of, it is by no means conclusive. Varying conditions existing on different lines must of necessity justify differences in rates for hauls of the same distance. The real question in any such complaint is the reasonableness of the particular rate on the particular line between the particular points in question. In testing such a rate, the rate on the same or adjacent lines in the immediate territory are of much greater significance and afford a much more accurate basis for the action of a commission.—*Dallas Bureau v. Gulf, C. & S. F. R. Co.*, 12 Inters. Com. R. 257.

It is competent to compare distances, rates and conditions on other roads, in dealing with an alleged unreasonable rate.—*Cannon v. Mobile & O. R. Co.*, 11 Inters. Com. R. 537.

Rates influenced by water competition possess value as standards of comparison but are not always conclusive in fixing rates to intermediate and non-competitive points.—*Shipper's Union v. A. T. & S. F. R. Co.*, 9 Inters. Com. R. 250.

A rate can seldom be considered "in and of itself," but must be taken almost invariably in relation with other rates.—*Tileston Mill Co. v. N. P. R. Co.*, 8 Inters. Com. R. 346.

In order to make rates charged in one part of the country proper standards of comparison in a case of alleged unjust and unreasonable rates in another section, a substantial similarity in transportation conditions in the two sections must be shown.—*Evans v. U. Pac. R. Co.*, 6 Inters. Com. R. 520; *Hopper v. Ch. M. & St. P. R. Co.*, 91 Iowa, 638, 60 N. W. 487.

Rates in one part of the country afford no criterion for determining the reasonableness of rates charged in another section of the country where conditions are unlike.—*Morrall v. U. Pac. R. Co.*, 6 Inters. Com. R. 121.

In determining the absolute or relative reasonableness of a rate markedly grouped, it may not fairly be compared with the rate per ton per mile from that station of the group which is farthest from the place of destination, but only with the rate from that station which is the average distance of all the stations in the group from the place of destination.—*Delaware Grange v. N. Y. P. & N. R. Co.*, 3 Inters. Com. R. 828, 5 I. C. C. R. 161.

The question of the reasonableness of rates does not always depend on the opinion of qualified witnesses, but is often determined by a comparison of rates, records, etc., filed with the Interstate Commerce Commission.—*Delaware Grange v. N. Y. P. & N. R. Co.*, 3 Inters. Com. R. 828, 5 I. C. C. R. 161.

A former special and preferred rate is not a fair criterion of the reasonableness of a present rate.—*Myers v. Pa. Co.*, 2 Inters. Com. R. 151, 218, 403, 2 I. C. C. R. 573.

In determining the reasonableness of rates to a point by a longer competing line, the distance and rates by the shortest route should be taken into account.—*Lincoln Board of Trade v. Mo. Pac. R. Co.*, 1 Inters. Com. R. 648, 2 Inters. Com. R. 98, 2 I. C. C. R. 155.

In determining the reasonableness of rates, for relatively short distances, the rates on long shipments cannot be made a basis for comparison.—*Crews v. Richmond & D. R. Co.*, 1 Inters. Com. R. 490, 703, 1 I. C. C. R. 401.

Rates charged by other roads similarly situated may be considered in determining as to the reasonableness of rates.—*Evans v. Oregon R. & N. Co.*, 1 Inters. Com. R. 314, 326, 641, 1 I. C. C. R. 325.

Special favors in the form of reduced rates to particular customers may form an element in the inquiry whether, as a matter of fact, the general or standard rates are reasonable. If they are extended to such persons at the expense of the general public, the fact must be taken into account in ascertaining whether a given tariff of general prices is or is

not reasonable.—*Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, affg. s. c. 68 Hun (N. Y.), 486, 22 N. Y. Supp. 976.

Where there is a question as to the reasonableness of charges by a railroad for the storage of freight, evidence of what are reasonable warehouse charges is admissible.—*Central of Ga. R. Co. v. Turner*, 143 Ala. 142, 39 So. 30.

That a carrier charges some less than others is evidence tending to show that the higher charge is unreasonable.—*Cowden v. Pacific Coast Ss. Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221.

Rates charged for like goods for like distances may be considered in determining the reasonableness of a particular rate, and whether it is discriminatory.—*Blair v. Sioux C. & P. R. Co.*, 109 Iowa, 369, 80 N. W. 673.

[66] — Prior maintenance of rates.

While the long existence and use of a rate is an important fact tending to show it is sufficiently high, and properly requires the carriers to explain or justify an increase thereof, it has never been held to be conclusive on the question, unless a settled practice or policy in relation thereto is also shown.—*Warren Mfg. Co. v. So. R. Co.*, 12 Inters. Com. R. 447.

While the long prior existence and actual use of lower rates may create an inference or presumption that they are reasonably high, the mere publishing of rates, under which there has been no appreciable movement of traffic, does not show them to be reasonably remunerative to the carrier.—*Shiel v. Ill. Cent. R. Co.*, 12 Inters. Com. R. 242.

The existence of a lower rate in the somewhat remote past does not necessarily prove anything of value in ascertaining the reasonableness of a rate existing to-day.—*Enterprise Mfg. Co. v. Georgia R. Co.*, 12 Inters. Com. R. 149.

When a railway company advances a rate which has for some time been in force, the fact of its continuance is in the nature of an admission against that company which tends to show the unreasonableness of the advance.—*Central Y. P. Assn. v. Ill. Cent. R. Co.*, 10 Inters. Com. R. 505.

The presumption that rates long maintained by carriers are reasonable does not operate in a case where such rates have been established by the carriers in compliance with an order of the Interstate Commerce Commission.—*Proctor v. C. H. & D. R. Co.*, 9 Inters. Com. R. 440, distinguishing 3 Inters. Com. R. 131, 4 I. C. C. R. 87.

Largely increased business and profits of the carriers at the time advances in rates were made, increase the presumptive force of the prior

maintenance of the lower rates.—*National Hay Assn. v. L. S. & M. S. R. Co.*, 9 Inters. Com. R. 264.

The continuance of a given rate is not conclusive evidence of the reasonableness of that rate, but when a railway advances a rate which has been for some time in force, the fact of its continuance is in the nature of an admission against that company, which tends to show the unreasonableness of the advance; and the force of this admission becomes great when the advance is contemporaneous with a general decline in the average of railway rates and the lessened cost of service.—*Holmes v. So. R. Co.*, 8 Inters. Com. R. 561.

That for many years the carriers who are mainly engaged in the transportation of export flour have published the same rate upon wheat and flour, does not create an irrebuttable presumption against a tariff which places a higher relative charge on flour.—*Export & Domestic Rates*, 8 Inters. Com. R. 214.

That state legislatures or commissions consider a certain state rate a reasonable maximum does not require that the judgment of Congress or the Interstate Commerce Commission as to the interstate rate should conform thereto.—*Savannah Bureau v. Charleson & S. R. Co.*, 7 Inters. Com. R. 601.

A railroad by putting in force a rate of charges furnishes evidence that the rate is profitable, which is more convincing when such rate is long maintained.—*Truck Farmers' Assn. v. Northeastern R. Co.*, 6 Inters. Com. R. 295.

That carriers often put certain rates into effect and maintain them for considerable periods makes it a fair inference that such rates are not too low.—*In re Excessive Rates on Food Products*, 3 Inters. Com. R. 93, 4 I. C. C. R. 48.

When a railroad voluntarily accepts and carries freight on terms made by itself, it furnishes evidence tending to prove that such terms are profitable. When such terms or rates are of long continuance, or are adopted as often as necessary to secure business, the evidence is more convincing that the terms and rates are remunerative.—*Coxe Bros. v. Lehigh V. R. Co.*, 2 Inters. Com. R. 195, 229, 3 Inters. Com. 460, 4 I. C. C. R. 535.

In long maintaining a certain rate, a carrier is making evidence that it is not too low.—*Logan v. Ch. & N. W. R. Co.*, 2 Inters. Com. R. 14, 19, 431, 2 I. C. C. R. 604.

Actual rates which have been charged by a company have evidentiary value in determining the value of the company's plant and franchises.—*Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6; 60 L. R. A. 856.

[67] — Competition.

Advances in rates cannot be the result of competition,—see ante, § 26, note [39].

Removal of competition as justification for advances in rates,—see ante, § 26, note [39].

Competition as justification for disparities in rates,—see ante, § 31, notes [37]–[40].

Competition as justification for discriminations in service and facilities,—see ante, § 32, note [10].

Competition as justifying violations of long and short haul rule,—see post, § 36, notes [31]–[35].

Competition may be considered in rate making, and may be even a controlling factor.—*Interst. Com. Commission v. L. & N. R. Co.*, 190 U. S. 273, 23 Sup. Ct. R. (U. S.) 687; *East. Tenn. V. & G. R. Co. v. Interst. Com. Commission*, 181 U. S. 1, 21 Sup. Ct. R. (U. S.) 516; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 20 Sup. Ct. R. (U. S.) 209, revg. s. c. 83 Fed. 898, 71 Fed. 835; *Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45; *Texas & P. R. Co. v. Interst. Com. Commission*, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666, revg. s. c. 57 Fed. 948, affg. s. c. 52 Fed. 187; *Cincinnati, N. O. & T. P. R. Co. v. Interst. Com. Commission*, 162 U. S. 184, 16 Sup. Ct. R. (U. S.) 700; *Interst. Com. Commission v. B. & O. R. Co.*, 145 U. S. 263, 12 Sup. Ct. R. (U. S.) 844, affg. s. c. 43 Fed. 37; *Interst. Com. Commission v. Ch. G. W. R. Co.*, 141 Fed. 1003; *Buchanan v. No. Pac. R. Co.*, 3 Inters. Com. R. 655, 5 I. C. C. R. 7; *Pickering Phipps v. L. & N. W. R. Co.* (1892), 2 Q. B. D. (Eng.) 229.

A state commission, the same as railway managers, should take into account “commercial necessity” and conditions of competition, in fixing reasonable rates.—*State v. Minneapolis & St. L. R. Co.*, 80 Minn. 191, 83 N. W. 60; affd. 186 U. S. 257, 22 Sup. Ct. R. (U. S.) 900.

[68] — Reduction of rate by carrier.

The action of a railway company in reducing a rate upon complaint of a shipper is not conclusive evidence that the rate was unreasonable before the reduction, but when the traffic manager of that company, after a careful examination of the facts, makes the reduction, such action is in the nature of an admission against the reasonableness of the obnoxious rate at the time of the reduction.—*Holmes v. So. R. Co.*, 8 Inters. Com. R. 561.

That a carrier reduces a rate is not, in itself, proof that the former rate was unreasonable, since the reduction may have been warranted by a decrease in the cost of transportation or increase in the volume of traffic.—*Loud v. South Car. R. Co.*, 4 Inters. Com. R. 205, 5 I. C. C. R. 529.

A reduction by a railroad of its tariff below the rate fixed by a commission, affords no basis for an arbitrary reduction of the commission's maximum standard to the voluntary low rate of the carrier.—*Southern R. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429.

[69] — Statistical tables.

In a proceeding as to the reasonableness of rates fixed by the North Dakota commission, evidence in the form of statistical tables as to the business of the company may be received and considered for what it is worth, although covering only occasional or alternate months, where it was not controverted that such months were average and typical.—*Northern Pac. R. Co. v. Keyes*, 91 Fed. 47.

In a proceeding as to the reasonableness of rates fixed by the North Dakota commission relevant statistical tables were properly received, over the objection of the attorney-general, where such tables were prepared by forty or fifty clerks under the direction of the general officers of the company, who were sworn although the clerks were not, the company, however, allowing the fullest and freest access to the tables, the sources of information, etc., and offering to swear any or all of the clerks. This was the only practicable method of compiling such information, and the attorney-general must have been satisfied with the correctness of the testimony, else he would have investigated its trustworthiness.—*Northern Pac. R. Co. v. Keyes*, 91 Fed. 47.

[70] — Reports and statements.

It may well be doubted whether a railroad company can rely, as evidence in its own behalf, upon a report made and filed by it.—*Seaboard Air L. R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, affg. s. c. 48 Fla. 129, 37 So. 314, and 48 Fla. 150, 37 So. 658.

A sworn statement of the value of a line of railroad, made by it to the state comptroller for purposes of taxation, is evidence of the value of the road, and may be considered in determining the reasonableness of rates or charges fixed by a state commission, but it is not conclusive on the company for the latter purpose.—*Louisville & N. R. Co. v. Brown*, 123 Fed. 946.

The return made by a railroad company to a state board of equalization, as to the value of the property for taxation, is competent but not conclusive evidence before a state board of railroad commissioners, in determining the reasonableness of rates.—*Southern Pac. Co. v. Board of R. R. Comrs.*, 87 Fed. 21.

To make a financial statement of a railroad in any way conclusive as a measure of its legitimate earnings, it must give, in addition to its fixed charges and capital account, the history of that capital account,

the value of the stock and various securities involved, as well as the actual cost and value of the property itself.—*Grain Shippers' Assn. v. Ill. Cent. R. Co.*, 8 Inters. Com. R. 158.

Where a railroad has rendered a report to the Commissioner of Railroads as to its net and gross receipts, and the commissioner has ordered the company to put in effect a schedule of rates based on such report, the burden is on the railroad of showing that such report erred in purporting to include only intrastate traffic, but that it did in fact include interstate traffic and hence was not a proper basis of computation.—*Commissioners of Railroads v. Wabash R. Co.*, 123 Mich. 669, 82 N. W. 526; *affd.* 126 Mich. 113, 85 N. W. 466.

[71] — Opinion evidence.

Upon the question of the reasonableness of a rate, a witness may give an opinion as evidence, but that opinion must depend upon reasons which are in the main capable of being considered and comprehended. If a freight agent believes that the rate which he makes is a reasonable one, he must have some reason for that belief. Let him state his reason along with his opinion, and the opinion will be entitled to credit according as his reason commends itself to the judgment of the trier.—*Board of R. R. Comrs. v. C. N. O. & T. P. R. Co.*, 7 Inters. Com. R. 380.

If a witness pronounces a rate unreasonable but bases his opinion wholly on a comparative table which tends to sustain but does not establish his conclusion, his opinion is of no weight as evidence.—*Board of R. R. Comrs. v. C. N. O. & T. P. R. Co.*, 7 Inters. Com. R. 380.

[72] What rates are reasonable.

Facts showing reasonableness of rates,—see also ante, § 26, note [37].

Where 16.43 per cent. of the total freight business of a carrier is in one commodity, and the rate fixed by a state commission for that commodity is nearly two mills per ton higher than the average on such road for all classes of freight, the court will not say that such a rate is confiscatory.—*Seaboard Air L. R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, *affg.* s. c. 48 Fla. 129, 37 So. 314, and 48 Fla. 150 37 So. 658.

It is not confiscation nor a taking of property without due process for the state to prescribe water rates which allow an income of six per centum on the then value of the property actually used, even though the company previously had been permitted to charge rates yielding one and one-half per cent. per month.—*Stanislaus Co. v. San Joaquin C. & I. Co.*, 192 U. S. 201, 24 Sup. Ct. R. (U. S.) 241.

A tariff fixed by a commission for coal in car-load lots is not proved to be unreasonable, by proof that if such schedules were applied to all freight the road would not pay its operating expenses. It might be that the existing rates on other merchandise, not reduced by the commission, might enable the company to earn substantial profits on its entire state business.—*Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. R. (U. S.) 900, affg. s. c. 80 Minn. 191, 83 N. W. 60.

A state enactment or regulations made under the authority of a state enactment, establishing rates for transportation that will not admit of the carrier earning such compensation as under all circumstances is just to itself and the public, would deprive such carrier of its property without due process of law.—*Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. R. (U. S.) 418, affg. s. c. 64 Fed. 165.

The Supreme Court of the United States does not wish to be understood as laying down an absolute rule that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that a tariff is unjust and unreasonable. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when labor and material were at the highest price, so that the actual cost exceeds the present value; the road may have been unwisely built, in localities where there is not sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built, as well as the rights of those who have built the road. But a general averment in a bill that a tariff as established is unjust and unreasonable, is supported by the admitted facts that the road cost far more than the amount of stock and bonds outstanding; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest prices consistent with the successful operation of the road; that the rates voluntarily fixed by the company have for ten years been steadily decreasing until the aggregate decrease has been more than fifty per cent.; that under the rates thus voluntarily established, the stock, which represents two-fifths of the value, has never received anything in the way of dividends; that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt; that the proposed tariff, as enforced, will so diminish the earning that they will not be able to pay one-half of the interest on the bonded debt above the operating expenses.—*Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 14 Sup. Ct. R. (U. S.) 1047.

A three cents per mile maximum rate, fixed by state statute, is not shown to be unconstitutional by evidence that under it, existing traffic would yield a net yearly income of less than $1\frac{1}{2}$ per cent. on the original cost of the road, a little more than 2 per cent. on the bonded debt, in the absence of proof of the cost of the bonded debt, the amount of the capital stock of the reorganized corporation, or the price paid by the corporation for the road, such corporation being reorganized by the purchasers at the sale of the railroad under a decree of foreclosure.—*Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. R. (U. S.) 1028.

A passenger rate schedule fixed for a railroad by a state commission cannot be enjoined on the ground that to put it in effect will simply result in a reduction in rates by other roads so far permitted to charge higher rates, at competitive points, which will operate as a discrimination between localities.—*Houston & T. C. R. Co. v. Storey*, 149 Fed. 499.

For a state commission to prescribe unreasonably low rates for one carrier, at the same time permitting others similarly situated to go on charging higher rates, denies to the former the equal protection of the laws.—*Houston & T. C. R. Co. v. Storey*, 149 Fed. 499.

Evidence tending to show that rates between certain points are too high as compared with rates from the same initial points to other points is not sufficient to show that the first named rates are of themselves unreasonable under Interst. Com. Act, § 1.—*Interst. Com. Commission v. Nashville, C. & St. L. R. Co.*, 120 Fed. 934.

When the earnings of a railroad, conducted efficiently, economically and honestly, with operating expenses in no case greater than such management requires, are insufficient to pay one-half the interest on a valid debt contracted in a careful, honest and economical administration of the company's business, a schedule of rates made by a state railroad commission which would materially reduce such earnings, is unjust and unreasonable.—*Chicago, M. & St. P. R. Co. v. Smith*, 110 Fed. 473.

Before a rate fixed by a commission is pronounced unreasonable, the result of fixing the rate must clearly be unreasonable.—*Matthews v. Board of Corp. Comrs.*, 106 Fed. 7.

An act of the Massachusetts legislature required street railway companies to transport scholars of public schools to and from the school houses and their homes at one-half the regular fare charged other passengers.—*Held*, that upon its face the statute seems open to the objection of unreasonably reducing the rates charged by railroad companies, and to the further objection of discriminating in favor of a particular class in the community, and that there are grave doubts as

to the constitutionality of the act. (Point not decided, however.)—*Ahern v. Newton & B. St. R. Co.*, 105 Fed. 702.

A Vermont statute reducing the rates of fare on railroads below what will permit the railroad company to earn a reasonable return on its investment is a taking of property without due process of law.—*Ball v. Rutland R. Co.*, 93 Fed. 513.

Rates fixed by a state railroad commission are not necessarily reasonable if they allow a dividend, however small, above charges, expenses, etc., nor to show their unreasonableness is it necessary to show them to be confiscatory. The carrier is entitled to receive, besides its charges and expenses, an adequate dividend.—*Southern Pac. Co. v. Board of R. R. Comrs.*, 78 Fed. 236.

A state act prescribing maximum rates on all railroads by reducing local freight rates 29½ per cent. is invalid when the rates thereby fixed are such that there would be no net earnings from the state or interstate transportation of freight if the same rates were applied to all the business of such carriers.—*Ames v. U. Pac. R. Co.*, 64 Fed. 165; affd. 169 U. S. 466, 18 Sup. Ct. R. (U. S.) 418.

That rates fixed by a state legislature are no lower than, nor as low as, those of other states, does not render adequate the return permitted by the law fixing such rates, where it appears that the railroads would have no net earnings from local freight if such rates were enforced.—*Ames v. U. Pac. R. Co.*, 64 Fed. 165; affd. 169 U. S. 466, 18 Sup. Ct. R. (U. S.) 418.

Where the rate fixed by a commission will not pay the cost of necessary skilled service, the cost of the best equipment, the keeping of the same in proper condition, the interest on the bonds, and leave something for dividends, the court will enjoin the putting into effect of the rates.—*Chicago & N. W. R. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744n.

What is reasonable compensation for a carrier.—*Wells v. Ore. R. & N. Co.*, 15 Fed. 561.

If the rate on a given article is reasonable to those who ship the great bulk of that article in the form in which it is commonly prepared for transportation, that rate does not become unreasonable to the shipper of a small quantity of cotton because he chooses to prepare his shipments in a form which gives the carrier a greater profit per 100 pounds.—*Planters' Compress Co. v. C. C. C. & St. L. R. Co.*, 11 Inters. Com. R. 382; affd and applied, *Planters' Compress Co. v. Mo., K. & T. R. Co.*, 11 Inters. Com. R. 606.

Refrigeration charges held reasonable.—*Consolidated F. Co. v. So. Pac. R. Co.*, 10 Inters. Com. R. 590.

Unless a carrier shows justification, an advance in rates which have long been applied to the transportation of a large and increasing traffic will be held unreasonable.—*Tift v. So. R. Co.*, 10 Inters. Com. R. 548.

Where an entire system of rates is involved, the question is whether the revenue yielded by the rates on all traffic is a fair return on the value of that property which is "employed for the public convenience."—*Central Y. P. Assn. v. Ill. Cent. R. Co.*, 10 Inters. Com. R. 505.

A railroad freight depot and a public storage warehouse are buildings whose business and uses are wholly dissimilar, and therefore railroads are justified in imposing greater storage charges than those fixed by warehouse companies.—*Blackman v. So. R. Co.*, 10 Inters. Com. R. 352.

A rate for the transportation of horses in less than carload lots, while reasonable as applied to the shipment of one horse, is unreasonable as applied to the shipment of four horses when it makes the charge for such shipment \$99, while a full carload of 25 horses may be shipped for \$100.—*Barrow v. Yazoo & M. V. R. Co.*, 10 Inters. Com. R. 333.

Except in unusual cases, no rate is reasonable, which does not yield the carrier a fair return upon the transaction.—*Matter of Proposed Advance in Freight Rates*, 9 Inters. Com. R. 382.

Rates cannot be said to be reasonable which are not reasonably remunerative to the carrier, and rates which do not pay their full proportion of operating expenses, fixed charges and reasonable dividends, are not "in and of themselves" reasonably remunerative.—*Board of Trade v. Nashville, C. & St. L. R. Co.*, 8 Inters. Com. R. 503.

The rates on melons were complained of. The showing was that such rates were lower than those on cotton and general merchandise, though special speed and facilities were required, that the rates per ton per mile on melons were less than the average receipts of the road per ton per mile on all freight. The evidence did not show the cost of producing melons or the results of sales.—*Held*, that the rates are not shown to be excessive.—*Board of R. R. Comrs. v. Florence R. Co.*, 8 Inters. Com. R. 1.

A road paying 12 per cent. annually to stockholders cannot maintain that its rates from a market city to a competitive point on that road, agreed to by rival carriers and long enforced, are not sufficient compensation for carrying from the same market to a much less distant point on the same line but that the local rates back from the competitive point should be added to arrive at a proper charge for transportation to the intermediate locality.—*Calloway v. L. & N. R. Co.*, 7 Inters. Com. R. 431.

The demand and the receipt of an excessive sum for refrigeration is an unreasonable charge within the meaning of Interst. Com. Act, § 1.—*Truck Farmers' Assn. v. Northeastern R. R. Co.*, 6 Inters. Com. R. 295.

Reasonableness of a rate charged in view of the limitation of liability.—*Duncan v. A. T. & S. F. P. Co.*, 6 Inters. Com. R. 85.

Railway charges need not be so limited as to let the shipper realize the actual cost of production.—*In re Excessive Rates on Food Products*, 3 Inters. Com. R. 93, 4 I. C. C. R. 48.

An increase of one-sixth in the charge for the same service, through the device of charging for the gross instead of the net weight, is unreasonable, and hence will be enjoined by the Interstate Commerce Commission.—*Proctor v. C. H. & D. R. Co.*, 2 Inters. Com. R. 614, 3 Inters. Com. R. 131, 4 I. C. C. R. 87; distinguished, 9 Inters. Com. R. 440.

The trial judge, before whom was brought an action testing the constitutionality of a legislative regulation of the rates of a public service corporation, found that the act apparently did not impair plaintiff's income to the extent of preventing it from paying its operating expenses, fixed charges, and a fair annual dividend to stockholders. It appeared, however, that immediately after the act went into force, the corporation's earnings fell off 20 per cent., although its dividends had never exceeded 7 per cent., its corporate existence expired in less than 12 years, and its bondholders had to be paid off within that time.—*Held*, that upon such a showing, the court will hold the act unconstitutional, in spite of the trial judge's finding.—*Rochester & C. Turnpike Co. v. Joel*, 41 App. Div. (N. Y.) 43, 58 N. Y. Supp. 346.

It is not reasonable regulation to compel a public service corporation to make an exception in favor of some particular class in the community, and serve the members of that class at a less sum than it has a right to charge those who are not members thereof.—*Rochester & C. Turnpike Co. v. Joel*, 41 App. Div. (N. Y.) 43, 58 N. Y. Supp. 346.

Figures were given to show that the total cost of construction, equipment, etc., of a road was about \$15,500,000, but nothing to show the depreciation, the present value, nor the earnings and cost of operation within a state.—*Held*, that this would not enable the court to say that rates allowing from the domestic business $3\frac{1}{2}$ per cent. net on the total cost of construction, equipment, etc., is confiscatory.—*State v. Seaboard Air L. R. Co.*, 48 Fla. 150, 37 So. 658; affd. 203 U. S. 261, 27 Sup. Ct. Ct. R. (U. S.) 109.

On a suit by a state commission to enforce a rate fixed by it, the showing was that the domestic business of the road alone produces a net earning of 3 per cent on the total valuation of the road in the state, no proper showing being made what part of the whole value of the property was engaged in domestic business.—*Held*, the rate will be enforced.—*State v. Atlantic C. L. R. Co.*, 48 Fla. 146, 37 So. 657.

Rates may be reasonable even though they do not afford a net income over and above the cost of operation, taxes and fixed charges.—*State v. Seaboard Air L. Co.*, 48 Fla. 129, 37 So. 314; *affd.* 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109.

That the rates fixed by a commission for one road are unreasonable as compared with rates fixed on another, even a connecting road, does not show the commission's rates to be unjust.—*Storrs v. Pensacola & A. R. Co.*, 29 Fla. 617, 11 So. 226.

That under schedules fixed by a state commission a railroad could not pay its reasonable operating expenses shows that the enforcement of such a rate would be a taking of property without just compensation.—*Pensacola & A. R. Co. v. State*, 25 Fla. 310, 5 So. 833, 3 L. R. A. 661n.

Rates fixed by a duly authorized commission are deemed reasonable until the contrary is shown.—*Southern R. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429.

An order was made by a state railroad commission, fixing rates for the transportation of coal.—*Held*, that the rate fixed is not shown to be confiscatory by a mere showing that if all classes of freight were carried at the rates fixed by the order, the revenue would be insufficient to enable the railroad to meet its obligations.—*State v. Minneapolis & St. L. R. Co.*, 80 Minn. 191, 83 N. W. 60; *affd.* 186 U. S. 251, 22 Sup. Ct. R. (U. S.) 900.

Where capital invested in the production of any commodity is comparatively unremunerative, yielding but a small return, a rate for the transportation of such commodity may be reasonable, although, if the carrier was required to do all his business at rates fixed on a corresponding basis, such rates would be unreasonable to the extent of being confiscatory.—*Steenerson v. Gt. Northern R. Co.*, 69 Minn. 353, 72 N. W. 713.

Twenty-five cents per car is a reasonable charge for the service of placing cars on private track scales for weighing, etc.—*Norfolk & P. R. Co. v. Commonwealth*, 103 Va. 289, 49 S. E. 39.

[73] Orders.

Effect of orders,—see ante, § 23, notes [1]–[3].

Suspension of orders by Commission,—see ante, § 23, note [4].

Judicial review of orders,—see ante, § 23, notes [5]–[9].

Judicial restraint of orders,—see ante, § 23, notes [10]–[19].

Federal interference with orders of state commissions,—see ante, § 23, notes [20]–[28].

Scope of orders,—see ante, § 48, note [17].

Judicial enforcement of orders,—see post, § 57, notes.

Reports of former Board of Rapid Transit Railroad Commissioners,
—see post, § 83, note [3].

An order of a state commission that rates for the transportation of phosphate shall not exceed one cent per ton per mile does not make the rate per mile the same for any distance, but merely fixes a maximum within which the carrier may make, such reductions for distance as it thinks is warranted.—*Seaboard Air L. R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, affg. s. c. 48 Fla. 129, 37 So. 314, and 48 Fla. 150, 37 So. 658.

Courts will not indirectly give power to the Interstate Commerce Commission to prescribe rates by granting it a peremptory order that in the future the railroads must follow the rates which the commission determined were, at the time of the inquiry, reasonable and just.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45, affg. s. c. 74 Fed. 715, 69 Fed. 227.

A statute of a state, fixing maximum fares and for that purpose classifying railroads by the length of their lines and fixing different rates per mile for each class, does not deny to any corporation the equal protection of the laws, within the meaning of the U. S. Constitution.—*Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. R. (U. S.) 1028, affg. s. c. 49 Ark. 455, 5 S. W. 718; *Ruggles v. Illinois*, 108 U. S. 526, 2 Sup. Ct. R. (U. S.) 832, affg. s. c. 91 Ill. 256; *Illinois Cent. Railroad v. Illinois*, 108 U. S. 541, 2 Sup. Ct. R. (U. S.) 839, affg. s. c. 95 Ill. 313.

The defendant carriers changed their classification of freight by advancing hay and straw in carloads from the sixth to the fifth class. Upon complaint, the Interstate Commerce Commission found this change to be unwarranted and unlawful, and ordered the defendants to cease "classifying hay and straw in carloads as fifth class freight, and from charging and exacting fifth class rates" for the transportation of such commodities in carload quantities.—*Held*, in a proceeding to enforce such order, that it was invalid, as an attempt by the Commission virtually to fix rates.—*Interst. Com. Commission v. L. S. & M. S. R. Co.*, 134 Fed. 942; affd. 202 U. S. 613, 26 Sup. Ct. R. (U. S.) 766.

An order of the Interstate Commerce Commission permitting a carrier to make commodity rates on competitive traffic to the common market which are less than their rates on similar traffic to an intermediate non-competing point, but requiring that such commodity rates must not be lower than necessary to meet competition, nor be applied to articles not actually subject thereto, is a mere general statement of the law applicable, and is too indefinite to be judicially enforced.—*Farmers' Loan & T. Co. v. No. Pac. R. Co.*, 83 Fed. 249.

That a member of a state railroad commission was interested, as a shipper, in the rates fixed, his vote not being necessary to the decision, does not render such decision invalid.—*Southern Pac. Co. v. Board of R. R. Comrs.*, 78 Fed. 236.

Where a discrimination in rates and services has been shown, the method of redress must always be left to the carrier, in the first instance, at least. An arbitrary and peremptory order, which leaves him with no discretion or freedom in making the best readjustment practicable, is unlawful.—*Detroit, G. H. & M. R. Co. v. Interst. Com. Commission*, 74 Fed. 803, revg. 57 Fed. 1005; affd. 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986.

The power to "regulate" the facilities classified as accessorial service, conferred by the Interstate Commerce Act on the Interstate Commerce Commission, must be confined to existing conditions, and be one of "regulation" merely, not extending to deprivation, construction or reconstruction of properties, to carry out a decision. Hence, an order of the Commission directing a carrier to wholly discontinue a long-established custom of furnishing cartage in a particular city is beyond the power of the Commission, if it will operate to deprive the carrier of his business at that place.—*Detroit, G. H. & M. R. Co. v. Interst. Com. Commission*, 74 Fed. 803, revg. s. c. 57 Fed. 1003; affd. 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986.

The report, finding or decision of the Interstate Commerce Commission in a particular case should show the issues in the case and the findings of the commission thereon; should refer to the evidence as to disputed facts and the decision of the Commission as to such disputed facts; and if facts are undisputed, the report should show that fact.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

An order of the Interstate Commerce Commission which forbids a railroad from charging more than the third class rate for the transportation of window shades of all kinds will not be enforced, as it ignores the element of the value of the service in fixing the reasonable compensation of the carrier and denies him any remuneration for additional risk in carrying shades of a greater value.—*Interst. Com. Commission v. D. L. & W. R. Co.*, 64 Fed. 723.

Since an order of the Interstate Commerce Commission is not binding until it has passed the scrutiny of the courts, and since there is no appeal or review of a decision adverse to the complainant, an order will be made favorable to the latter, in a doubtful case.—*Miner v. N. Y. N. H. & H. R. Co.*, 11 Inters. Com. R. 422.

It is not a valid defense to a proposed order of a state commission that it would require the carrier to exercise the power of eminent domain, construct a railroad track, operate the same, etc.—*Jacobson v. Wisconsin, M. & P. R. Co.*, 71 Minn. 514, 74 N. W. 893.

A carrier cannot acquire any right to impose an unlawful rate from an approving act of the board of railroad and warehouse commissioners of Missouri.—*McGrew v. Mo. Pac. R. Co.*, 118 Mo. App. 379, 94 S. W. 719.

A proviso that "the charge for transportation or conveyance shall not exceed 35 cents per 100 pounds on heavy articles," etc., does not show intent to establish a rate for intermediate distances and weights in proportion to the amount specified but to establish a maximum beyond which the carrier could not go.—*Ragan v. Aiken*, 77 Tenn. 609.

§ 50. Power of commissions to order repairs or changes.—If, in the judgment of the commission having jurisdiction, repairs or improvements to or changes in any tracks, switches, terminals or terminal facilities, motive power, or any other property or device used by any common carrier, railroad corporation or street railroad corporation in or in connection with the transportation of passengers, freight or property ought reasonably to be made, or that any additions should reasonably be made thereto, in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for the transportation of passengers, freight or property, the commission shall, after a hearing either on its own motion or after complaint, make and serve an order directing such repairs, improvements, changes or additions to be made within a reasonable time and in a manner to be specified therein, and every common carrier, railroad corporation and street railroad corporation is hereby required and directed to make all repairs, improvements, changes and additions required of it by any order of the commission served upon it.

Power of Interstate Commerce Commission to order alterations in terminal facilities on complaint of shipper,—see Interst. Com. Act, § 1, post, Appendix B.

Statutory standard as to weight of rails, form of cattle guards, fences, crossings, signals, etc.,—see N. Y. R. R. L., §§ 31-34.

Power of former Board of Railroad Commissioners to compel repairs, changes and alterations,—see N. Y. R. R. L., § 161.

Power of former Board of Rapid Transit Railroad Commissioners to order repairs and alterations in switches, sidings, platforms, signal devices, etc.,—see N. Y. Rap. Tr. Act, §§ 6, 32a, post, Appendix A.

Duty of carriers to furnish safe and adequate service and facilities generally,—see ante, § 26.

Duty of carriers to furnish adequate and reasonable service and facilities,—see ante, § 26.

Power of Commission to order switch and sidetrack connections,—see also ante, § 27.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

Power of the state to prescribe the size and character of rails,—see ante, § 1, note [2].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Who are common carriers,—see ante, § 2, notes [2]–[7].

What constitutes a railroad or street railroad,—see ante, § 2, note [8].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Effect of vacancies on power of commission,—see ante, § 4, note [5].

Validity of commission plan of regulation,—see ante, § 4, note [14].

Compelling production of books and papers,—see ante, § 19, notes [3]–[6].

Punishment of witnesses for contempt,—see ante, § 19, notes [7]–[12].

Commission not bound by technical rules of procedure,—see ante, § 20, note [1].

Immunity of witnesses,—see ante, § 20, notes [2]–[9].

Effect, reviews and restraint of orders,—see ante, § 23, notes.

Review of orders,—see ante, § 23, notes.

Judicial enforcement of orders,—see post, § 57, notes.

[1] Highway crossings.

Power of the state to prescribe the character and style of highway crossings,—see ante, § 1, note [2].

Whether requiring maintenance of electric lights at crossings is a regulation of interstate commerce,—see ante, § 25, note [16].

Railway and street railway crossings,—see ante, § 35, notes [34]–[38].

A railroad must so improve and maintain a crossing as reasonably to subserve the growing needs of the public. It does not perform the full measure of its duty by making a sufficient crossing over a highway, when by growth of population and travel it becomes inadequate to accommodate in a reasonable manner the increasing needs of the public.—*Indiana v. Lake Erie & W. R. Co.*, 83 Fed. 284.

The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty, and if by the increase of

population or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public.—*Lake Erie & W. R. Co. v. Smith*, 61 Fed. 885.

As to crossings, signals, gates, etc., it is the general policy of the state to subject railroads to state rather than to municipal regulations.—*Long Island City v. L. I. R. Co.*, 79 N. Y. 561, affg. s. c. 8 Hun (N. Y.), 58.

Under N. Y. R. R. L., § 62, the Board of Railroad Commissioners had power to order that a certain highway which crossed railroad tracks at grade be discontinued and that the traffic upon it be diverted to another highway which such Commission determined should be carried over the said tracks by means of a viaduct.—*Matter of Terminal R. Co.*, 122 App. Div. (N. Y.) 59, 106 N. Y. Supp. 655.

N. Y. R. R. L., § 60, provided: "All steam surface railroads hereafter built, except additional switches and sidings, must be so constructed as to avoid all public crossings at grade whenever practicable to do so."—*Held*, that this provision did not mean that the N. Y. Board of Railroad Commissioners could not determine how or in what manner "additional switches and sidings" might be taken over a highway when the railroad asked for such a determination. The exception was merely in favor of the railroad corporation and could be waived by it.—*Matter of Terminal R. Co.*, 122 App. Div. (N. Y.) 59, 106 N. Y. Supp. 655.

The control of the N. Y. Public Service Commission over the manner in which railroads shall cross highways and over the methods and character of construction of such crossings is a continuing administrative duty.—*Petition of Terminal Ry. of Buffalo*. Decided by the N. Y. Public Service Commission for the Second District, May 4, 1908.

The reasons stated, upon which the Public Service Commission of the Second District based its action in eliminating the grade crossing over the tracks of the N. Y. C. & H. R. R. Co. at Genesee St. in the city of Utica.—*Petition of Mayor and Common Council of Utica*. Decided by the N. Y. Public Service Commission of the Second District, March 10, 1908.

In a case arising under N. Y. R. R. L., § 60, involving the crossing of a highway in the town of Cornwall by a railroad, the part of the highway in question was relocated by the State Engineer and an overcrossing by the railroad was required by the former Board of Railroad Commissioners, the Board in its final order providing for the abandonment of the old highway at this point. The railroad company, pursuant to the order, constructed a concrete arch at the point of undercrossing. Later the town board complained to the Public Service Commission alleging that the sharp curves in the highway at either end of the crossing would make it an exceedingly dangerous point for vehicles on account of the inability to note the approach of other vehicles, and

asked that the crossing be made at the point of intersection of the old highway. The town board had been represented on the original hearing and the matter now complained of had been fully discussed. The railroad thereafter filed with the Commission a letter, in which it stipulated that it would alter the highway so as to obviate the difficulty.—*Held*, that the petition of the board should be dismissed.—*Petition of the Town Board of Cornwall*. Decided by the N. Y. Public Service Commission of the Second District, Feb. 18, 1908.

A railroad cannot be compelled to elevate or depress its tracks laid at grade over streets, unless by reason of some peculiarity such tracks have become especially dangerous.—*Mayor v. Central R. Co. of N. J.*, — N. J. Eq. —, 67 Atl. 1009.

The test in determining what policy shall be pursued at crossings, whether they shall be left at grade or whether the railroad corporation shall be compelled to elevate or depress them, is not economy of operation but the safety and convenience of those of the travelling public who have occasion to cross.—*Mayor v. Central R. Co. of N. J.*, — N. J. Eq. —, 67 Atl. 1009.

[2] Equipment and appliances.

Extent of power of state to regulate as to safety appliances,—see ante, § 25, note [10].

New York statutes regulating the mode of heating steam passenger cars and directing the placing of guards and guard-posts on railway bridges, etc., do not, as applied to interstate roads, violate the commerce clause of the United States Constitution, and are valid exercise of the powers resting in the state in the absence of action by Congress.—*New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. R. (U. S.) 418, affg. 142 N. Y. 646, 37 N. E. 568.

All cars should be equipped with air brakes, and all such brakes should be used and operated.—*In re Power or Train Brakes*, 11 Inters. Com. R. 429.

A state statute compelling railroads to heat passenger cars by apparatus other than stoves is a valid exercise of police power and applies to railroads engaged in interstate commerce.—*People v. N. Y. N. H. & H. R. Co.*, 55 Hun (N. Y.), 409, 8 N. Y. Supp. 672; affd. without opinion, 123 N. Y. 635, 25 N. E. 953.

The provisions of the N. Y. Public Service Commissions Law, §§ 26, 49 and 50, demonstrate that a chief purpose of the statute is that common carriers by railroad in the State shall at all times render to the public safe, adequate and proper service and maintain their line or lines in a condition to afford such service. It is the duty of the Public Service Commissions to secure their enforcement.—*In re Port Jervis Elect. L. P. G. & R. R. Co.* Decided by the N. Y. Public Service Commission for the Second District, May 12, 1908.

"Equipment" as applied to railroads, means those things necessary to the operation of a railway, as cars, locomotives, etc.—*People v. St. L. A. & T. H. R. R. Co.*, 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656.

[3] Changes of motive power.

Permitting a change of motive power a judicial act,—see ante, § 4, note [19].

A corporation was empowered by its charter to operate a railroad in a city by "any mechanical or other power."—*Held*, that upon obtaining the consent of the municipal authorities it had the right to change its motive power and operate its road by electricity.—*Hudson R. Tel. Co. v. Watervliet, T. & R. Co.*, 135 N. Y. 393, 32 N. E. 148, affg. s. c. 61 Hun (N. Y.), 140, 161, 15 N. Y. Supp. 752, 763.

The N. Y. Board of Railroad Commissioners, under N. Y. R. R. L., § 100, is not required to refuse consent to a change in motive power because the motor proposed to be used is still in its experimental stage, or because the corporation applying to use it is controlled by persons interested in the manufacture of such motors.—*People ex rel. Babylon R. Co. v. Board of R. R. Comrs.*, 32 App. Div. (N. Y.) 179, 522 N. Y. Supp. 908; affd. 158 N. Y. 711, 53 N. E. 1129.

Granting a street railroad permission to change its motive power confers rights in the nature of a franchise, and the N. Y. Board of Railroad Commissioners cannot subsequently reverse or modify its decision.—*People ex rel. Luckings v. Board of R. R. Comrs.*, 30 App. Div. (N. Y.) 69, 51 N. Y. Supp. 781; affd. 156 N. Y. 693, 51 N. E. 1093.

In the absence of statutory authorization, the N. Y. Board of Railroad Commissioners cannot subsequently reconsider or review its action in granting permission to a street railroad to change its motive power. Such permission is in the nature of a franchise.—*People ex rel. Luckings v. Board of R. R. Comrs.*, 30 App. Div. (N. Y.) 69, 51 N. Y. Supp. 781; affd. 156 N. Y. 693, 51 N. E. 1093.

In authorizing the Board of Railroad Commissioners to permit railroads to substitute electrical for steam power, the Legislature intended that such power should be exercised not in conflict with the established law and policy of the state as to overhead electrical wires.—*Potter v. Collis*, 19 App. Div. (N. Y.) 392, 46 N. Y. Supp. 471; affd. 156 N. Y. 16, 50 N. E. 413.

A street railroad corporation cannot use electric power to operate its cars without the consent of N. Y. Board of Railroad Commissioners.—*Trelford v. Coney I. R. Co.*, 6 App. Div. (N. Y.) 204, 40 N. Y. Supp. 1150.

[4] Stations and waiting-rooms.

"Depot" and "station" defined,—see ante § 2, note [10].

Power of state to vest a commission with power to require building of stations—see ante, § 4, note [14].

Consenting to discontinuance of a station a judicial act,—see ante, § 4, note [19].

Duty of carriers as to depots and grounds,—see ante, § 26, note [16].

A Minnesota statute empowered the state Railroad and Warehouse Commission to compel railroads to erect and maintain depots, etc., and prescribe the kind and condition of such erections.—*Minneapolis & St. L. R. Co. v. Minnesota*, 193 U. S. 53, 24 Sup. Ct. R. (U. S.) 396.

Mandamus will not lie to compel a railroad to erect a station at a particular place, unless there is a specific duty, imposed by statute, to do so, and clear proof of a breach of that duty.—*Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492, 12 Sup. Ct. R. (U. S.) 283.

The Legislature may require railroads to erect and maintain suitable waiting-rooms, etc., to accommodate passengers.—*State ex rel. Barton Co. v. Kansas City, Ft. S. & G. R. Co.*, 32 Fed. 722.

It is doubtful whether the Interstate Commerce Commission has power to compel a carrier to locate or relocate a station at a specific point, but certainly that Commission should not exercise such power unless all the facts and conditions clearly indicate that the interests of the public in the community concerned are materially impaired by the lack of such facilities.—*Jones v. St. L. & S. F. R. Co.*, 12 Inters. Com. R. 167.

At common law, a carrier of passengers and freight is under no obligation to provide depots for passengers or warehouses for freight awaiting transportation.—*People v. N. Y. L. E. & W. R. Co.*, 104 N. Y. 58, 9 N. E. 856, revg. 40 Hun (N. Y.), 570.

If the statute provides that a carrier may abandon a station only upon the consent of the Board of Railroad Commissioners, and such abandonment is done without such consent, mandamus will lie to compel the restoration of such station.—*State v. N. H. & N. Co.*, 37 Conn. 153.

A court has no authority to dictate the exact spot of the location of a depot building or to confine its location to any particular block or lot.—*Florida, C. & P. R. Co. v. State ex rel. Travares*, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419.

An act requiring railroads to join in establishing a union passenger station at a point named, is valid.—*Mayor v. Norwich & W. R. Co.*, 109 Mass. 103.

The legislature may empower railroad commissioners to direct railroad corporations to build and maintain depots at specified places on their lines, determined by the commissioners to be in accordance with the demands of public convenience and necessity.—*Railroad Comrs. v. P. & O. C. R. Co.*, 63 Me. 269.

Requiring the erection of passenger waiting-room at the intersections of railways is within the police power of the state.—*Missouri v. Wabash, St. L. & P. R. Co.*, 83 Mo. 144.

[5] Operation generally.

A municipality may compel a railroad company to lower its tunnel under a river so as to permit an increased depth of water for navigation.—*West Chicago St. R. Co. v. Chicago*, 201 U. S. 506, 26 Sup. Ct. R. (U. S.) 518.

A public service corporation occupying a street is bound to adopt such reasonable methods and safeguards as will most effectually permit of the use of the same street, etc., by the public and by other corporations whose user is of public advantage.—*Hudson R. Tel. Co. v. Watervliet, T. & R. Co.*, 56 Hun (N. Y.), 67, 9 N. Y. Supp. 177.

A railroad cannot leave its cars standing on a street crossing, or use or leave its cars thereon longer than is reasonably necessary to traverse such crossing with its cars.—*Town of Mason v. Ohio River R. Co.*, 51 W. Va. 183, 41 S. E. 418.

[6] Improvements.

The interests of the public and the stockholders will be subserved by encouraging a liberal application of the earnings to the improvement of the road.—*Union Pac. R. Co. v. U. S.*, 99 U. S. 402.

[7] Terminal facilities.

A railway company owned the right of way and grounds around its station. It permitted the erection of two grain elevators thereon, by private corporations. Under a statute requiring adequate facilities and forbidding unjust discrimination therein, the Nebraska Board of Transportation, upon findings of fact that the two elevators were insufficient and were also in a combination as to prices, etc., ordered the railroad to permit certain complainants to erect an additional elevator. The Supreme Court of Nebraska granted mandamus to enforce the order, upholding the interpretation put upon the statute by the Board.—*State ex rel. Board of Transportation v. Missouri Pac. R. Co.*, 29 Neb. 550, 45 N. W. 785. The Supreme Court of the United States held, however, that the order was beyond the power of the Board. To compel a carrier to permit the erection of a grain elevator on its private property, is taking of private property for a private use, for the elevator was simply for and by a voluntary association of individuals, acting for their personal profit, not for the public benefit.—*Missouri Pac. R. Co. v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. R. (U. S.) 130, revg. s. c. 29 Neb. 550, 45 N. W. 785.

[8] Effect of regulative act on existing right.

An act restricting or regulating an existing right to lay down railroad tracks, etc., is not a fresh grant of that right.—*Matter of Gilbert El. R. Co.*, 70 N. Y. 361, 3 Abb. N. C. (N. Y.) 434, affg. 9 Hun (N. Y.), 303.

§ 51. Power of commissions to order changes in time schedules; running of additional cars and trains.—If, in the judgment of the commission having jurisdiction, any railroad corporation or street railroad corporation does not run trains enough or cars enough or possess or operate motive power enough, reasonably to accommodate the traffic, passenger and freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not run any train or trains, car or cars, upon a reasonable time schedule for the run, the commission shall, after a hearing either on its own motion or after complaint, have power to make an order directing any such railroad corporation or street railroad corporation to increase the number of its trains or of its cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car or make any other suitable order that the commission may determine reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation.

Mandamus to compel carriers to move traffic or to furnish cars or other facilities,—see Interst. Com. Act, § 23, post, Appendix B.

Power of former Board of Railroad Commissioners to recommend changes in mode of operating railroads or of conducting their business,—see N. Y. R. R. L., § 161.

Provisions of the New York Rapid Transit Act relative to time schedules for the running of trains and cars,—see N. Y. Rap. Tr. Act, § 28, post, Appendix A.

Duty of carriers to furnish sufficient cars and motive power,—see ante, § 37.

Power of Commissions to order changes in motive power,—see ante, § 50.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Effect of vacancies on power commission,—see ante, § 4, note [5].

Validity of commission plan of regulation,—see ante, § 4, note [14].

Compelling production of books and papers,—see ante, § 19, notes [3]–[6].

Punishment of witnesses for contempt,—see ante, § 19, notes [7]–[12].

Commission not bound by technical rules of procedure,—see ante, § 20, note [1].

Immunity of witnesses,—see ante, § 20, notes [2]–[9].

Effect, review and restraint of orders,—see ante, § 23, notes.

Whether compelling the stopping of interstate trains is a regulation of interstate commerce,—see ante, § 25, note [15].

Failure to stop trains as form of discrimination,—see ante, § 32, note [30].

Power of Commission to compel stopping of trains,—see ante, § 49, note [17].

Judicial enforcement of orders,—see post, § 57, notes.

Mandamus to compel erection of station,—see post, § 57, note [13].

The Corporation Commission of North Carolina ordered a railroad to run its trains so as to make connections with those of another line. The railroad objected to the order on the ground, among others, that to obey the order would necessitate the running of another train, which could not be done with profit.—*Held*, that as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. The mere incurring of a loss from the performance of such a duty does not, in and of itself, necessarily give rise to the conclusion of unreasonableness.—*Atlantic C. L. R. Co. v. Carolina Corp. Commission*, 206 U. S. 1, 27 Sup. Ct. R. (U. S.) 585, affg. s. c. 137 N. C. 1, 49 S. E. 191.

An order of the North Carolina Corporation Commission compelling a railroad to run its trains so as to make connections with trains of another road is an order coming clearly within the scope of the power to enforce just and reasonable regulations.—*Atlantic C. L. R. Co. v. N. Carolina Corp. Commission*, 206 U. S. 1, 27 Sup. Ct. R. (U. S.) 585, affg. s. c. 137 N. C. 1, 49 S. E. 191.

If a railroad is not giving a town sufficient facilities and such cannot otherwise be had without compelling the stoppage of interstate trains, the appropriate course may be for the state commission to compel the running of more local trains, rather than the stoppage of the interstate trains in question.—*Mississippi R. Com. v. Illinois Cent. R. Co.*, 203 U. S. 335, 27 Sup. Ct. R. (U. S.) 90.

The term "public convenience" is not to be construed to give the government the right to usurp the management of a railroad and perform the functions of its officers.—*Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. R. (U. S.) 565, revg. s. c. 114 Mich. 460, 72 N. W. 328.

§ 52. Uniform system of accounts; access to accounts, etc.; forfeiture; *[liability of employees of commissions who divulge information].—Each commission may, whenever it deems advisable, establish a uniform system of accounts to be used by railroad and street railroad corporations or other common carriers which are subject to its supervision, and may prescribe the manner in which such accounts shall be kept. It may also in its discretion prescribe the forms of accounts, records and memoranda to be kept by such corporations, including the accounts, records and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The system of accounts established by the commission and the forms of accounts, records and memoranda prescribed by it as provided above shall conform as near as may be to those from time to time established and prescribed by the interstate commerce commission under the provisions of the act of Congress entitled "An act to regulate commerce" approved February fourth, eighteen hundred and eighty-seven, as amended by the act approved June twenty-ninth, nineteen hundred and six, and amendments thereto. The commission shall at all times have access to all accounts, records and memoranda kept by railroad and street railroad corporations and may prescribe the accounts in which particular outlays and receipts shall be entered, and may designate any of its officers or employees who shall thereupon have authority under the order of the commission to inspect and examine any and all accounts, records and memoranda kept by such corporations. Where the commission has prescribed the forms of accounts, records and memoranda to be kept by such corporations it shall be unlawful for them to keep any other accounts, records or memoranda than those so prescribed, or those prescribed by or under authority of the United States. Any employee or agent of the commission who divulges any fact or information which may come to his knowledge during the course of any such inspection or examination except in so far as he may be directed by the commission, or by a court or judge thereof, or authorized by law, shall be guilty of a misdemeanor.

* Words in brackets not a part of section heading as enacted—Ed.

Parallel provisions of the Interstate Commerce Act,—see Interst. Com. Act, § 20, post, Appendix B.

Schedules of rates, etc., shall conform as nearly as may be to the form established by the Interstate Commerce Commission,—see ante, § 28.

Access of Commission to accounts and books of carriers,—see also, ante, § 45, subd. 3.

Power of Commission to require reports and special information from carriers,—see ante, § 46.

Penalties and forfeitures for failure to keep accounts in the form required by Commission,—see post, § 56.

General power of the state to regulate property devoted to public use, see ante, § 1, notes [1]–[22].

Power of the state to regulate carriers' way of doing business,—see ante, § 1, note [2].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Franchise grants construed favorably to the public right,—see ante, § 1, note [30].

Who are common carriers,—see ante, § 2, notes [2]–[7].

Effect of vacancies on power of Commission,—see ante, § 4, note [5].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Validity of commission plan of regulation,—see ante, § 4, note [14].

The Interstate Commerce Commission cannot require a railroad corporation to keep books between itself as a carrier and itself as a shipper and vendor of coal, to show what it charged itself for transporting its own coal.—*Haddock v. D. L. & W. R. Co.*, 3 Interst. Com. R. 123, 302, 4 I. C. C. R. 296.

§ 53. Franchises and privileges; * [approval of commission required; certificates of public convenience and necessity].—Without first having obtained the permission and approval of the proper commission no railroad corporation, street railroad corporation or common carrier shall begin the construction of a railroad or street railroad, or any extension thereof, for which prior to the time when this act becomes a law a certificate of public convenience and necessity shall not have been granted by the board of railroad commissioners or where prior to said time said corporation or common carrier shall not have become entitled

* Words in brackets not a part of section heading as enacted.—Ed.

by virtue of its compliance with the provisions of the railroad law to begin such construction; nor, except as above provided in this section, shall any such corporation or common carrier exercise any franchise or right under any provision of the railroad law, or of any other law, not heretofore lawfully exercised, without first having obtained the permission and approval of the proper commission. The commission within whose district such construction is to be made, or within whose district such franchise or right is to be exercised, shall have power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the franchise or privilege is necessary or convenient for the public service. And if such construction is to be made, or such franchise to be exercised in both districts, the approval of both commissions shall be secured.

General power of the state to regulate property devoted to public use,—
see ante, § 1, notes [1]–[22].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Who are common carriers,—see ante, § 2, notes [2]–[7].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Effect of vacancies on power of Commission,—see ante, § 4, note [5].

Validity of commission plan of regulation,—see ante, § 4, note [14].

Compelling production of books and papers,—see ante, § 19, notes [3]–[6].

Punishment of witnesses for contempt,—see ante, § 19, notes [7]–[12].

Permits to construct a switch in a public street,—see ante, § 27, note [11].

Board of Railroad Commissioners abolished and its powers and duties transferred to the Public Service Commission,—see ante, § 5, post, §§ 80, 83.

[1] What consents necessary.

Three consents must be secured before a surface street railroad can be built: (1) Of the owners of the abutting lands, or in lieu thereof, the consent of the Appellate Division, acting upon the report of its commissioners; (2) of the local authorities; (3) of the N. Y. Board of Railroad Commissioners.—*In the Matter of Application of Buffalo Traction Co.*, 25 App Div. (N. Y.) 447, 49 N. Y. Supp. 1052; *affd.* without opinion, 155 N. Y. 700, 50 N. E. 1115.

[2] Certificates of public convenience and necessity.**— As prerequisite.**

Provisions relative to granting of certificates of public convenience and necessity by former Board of Railroad Commissioners,—see N. Y. R. R. L., § 59.

Territorial jurisdiction of commissions for granting of permits,—see ante, § 5.

Giving of permits to newly formed gas and electrical corporations,—see post, § 68.

Whether granting certificates of necessity is a judicial act,—see ante, § 4, note [19].

A taxpayer sued to enjoin the city authorities of Brooklyn from granting a franchise to a certain street railroad corporation. It appeared that this corporation had not obtained the certificate of the N. Y. Board of Railroad Commissioners required by N. Y. R. R. L., § 59—*Held*, that under the conflicting decisions of the New York courts, the lack of this certificate did not so clearly disqualify the company from receiving a franchise at the hands of the city, as to warrant giving injunctive relief to the plaintiff.—*Seccomb v. Wurster*, 83 Fed. 856.

A street railroad corporation not having a certificate of necessity from the N. Y. Board of Railroad Commissioners may nevertheless bid at a sale of a franchise under N. Y. R. R. L., § 93.—*Matter of Empire City Traction Co.*, 4 App. Div. (N. Y.) 103, 38 N. Y. Supp. 983.

The granting of a certificate of convenience and necessity is not a prerequisite to the granting of local consents or franchises.—*People ex rel. West Shore T. Co. v. Bauer*, 54 Misc. (N. Y.) 28, 103 N. Y. Supp. 1078.

To have secured a certificate of necessity from the N. Y. Board of Railroad Commissioners is not a prerequisite to a valid application for a city franchise by a surface street railroad.—*McWilliams v. Jewett*, 14 Misc. (N. Y.) 491, 36 N. Y. Supp. 620.

[3] — Extensions of existing lines.

Where a railroad and a street railroad intersect, it is not necessary that such roads obtain the consent of the Public Service Commission, under N. Y. Pub. Serv. Com. L., § 53, before constructing an extension connecting their tracks, such connection being directed by N. Y. R. R. L., § 12, which is not superseded by the said section of the Public Service Commissions Law.—*Village of Ft. Edward v. H. V. R. Co.*, 192 N. Y. 139, 84 N. E. 962, affg. s. c. 122 App. Div. 903, 106 N. Y. Supp. 1148.

Where a proposed extension to a street railroad will really compose the main body of the road, a certificate of public convenience and necessity must be obtained.—*New York, C. & H. R. R. Co. v. B. & W. El. R. Co.*, 96 App. Div. (N. Y.) 471, 89 N. Y. Supp. 418.

The mere fact that a proposed extension is much longer than the original line is not sufficient to support the conclusion that the addition is a new road and not an extension, within the meaning of the N. Y. Railroad Law.—*Roberts v. Huntington R. Co.*, 56 Misc. (N. Y.) 62, 105 N. Y. Supp. 1031.

A certificate of necessity, pursuant to N. Y. R. R. L., § 59, is not requisite where a street surface railroad desires to make a *bona fide* extension of its route.—*Delaware, L. & W. R. Co. v. Syracuse, L. & B. R. Co.*, 28 Misc. (N. Y.) 456, 59 N. Y. Supp. 1035; *affd.* 43 App. Div. (N. Y.) 621, 60 N. Y. Supp. 386.

The building of a lateral line in connection with the main line of a street railway is the construction of an "extension" within the meaning of N. Y. Pub. Serv. Com. L., § 53.—*Application of Rochester, Corning, Elmira Traction Co.* Decided by the N. Y. Public Service Commission for the Second District, March 30, 1908.

It would seem that under the provisions of the N. Y. Railroad Law in effect prior to July 1, 1907, a street railroad company which had obtained a certificate of public convenience and a necessity could not, prior to the construction of any part of its line, obtain the right to construct an extension into new territory by merely complying with the provisions of N. Y. R. R. L., §§ 90, 91, relative to the construction of extensions.—*Application of Rochester, Corning, Elmira Traction Company.* Decided by the N. Y. Public Service Commission for the Second District, March 30, 1908.

A street railroad company which prior to July 1, 1907, had filed a statement of streets, highways, etc., upon which it proposed to construct an extension, but had not obtained the consents of local authorities and abutting owners as was required by N. Y. R. R. L., § 91, must apply to the N. Y. Public Service Commission under N. Y. Pub. Serv. Com. L., § 53, for the consent therein required.—*Application of Rochester, Corning, Elmira Traction Co.* Decided by the N. Y. Public Service Commission for the Second District, March 30, 1908.

[4] — Matters to be considered.

Commissioners, in deciding as to the public convenience and necessity of an extension of a street railway, may properly consider all the circumstances such as the probable growth of population, the convenience of the people and that there is a territory beyond the proposed extension which must be accommodated at an early day and that it can only be accommodated after such extension is built.—*Matter of United Traction Co.*, 119 App. Div. (N. Y.) 806, 104 N. Y. Supp. 377.

The fact that the territory through which a traction company desires to build its line is now occupied by other railroads is a fact properly considered in deciding whether a certificate of public convenience and neces-

sity should be granted, but it is in no sense a controlling fact.—*Matter of Rochester, Corning, Elmira Traction Co.*, 118 App. Div. (N. Y.) 521, 102 N. Y. Supp. 1112.

It is the undoubted policy of the law to foster and encourage every legitimate enterprise which is at all likely to prove advantageous to the general public; but, at the same time, it is the obvious duty of those upon whom the responsibility as to granting certificates of necessity rests to exercise a wise discretion in these matters, to the end that one enterprise, however alluring it may seem, shall not be aided and encouraged at the expense of another which is, perhaps, equally deserving.—*Matter of Auburn & W. R. Co.*, 37 App. Div. (N. Y.) 162, 55 N. Y. Supp. 895; *Matter of Depew & S. W. R. Co.*, 92 Hun (N. Y.), 406, 36 N. Y. Supp. 991; *Matter of Amsterdam, J. & G. R. Co.*, 86 Hun (N. Y.), 578, 33 N. Y. Supp. 1009; *Matter of New Hamburg & P. C. R. Co.*, 76 Hun (N. Y.), 76, 27 N. Y. Supp. 664; *People v. Ulster & D. R. Co.*, 58 Hun (N. Y.), 266, 12 N. Y. Supp. 303.

Upon an application to the N. Y. Board of Railroad Commissioners for a certificate of public convenience and necessity, the Board should inquire into all prior proceedings of the alleged corporation, and see if all essentials have been complied with.—*Matter of Kings, Q. & S. R. Co.*, 6 App. Div. (N. Y.) 241, 39 N. Y. Supp. 1004.

[5] — Grounds for granting or refusing.

Where a proposed railroad would have no local traffic but would be practically a switch or additional track of an existing road, the N. Y. Board of Railroad Commissioners made an improper exercise of its discretion in granting a certificate of necessity.—*People ex rel. Steward v. Board of R. R. Comrs.*, 160 N. Y. 202, 54 N. E. 697, affg. s. c. 40 App. Div. (N. Y.) 559, 58 N. Y. Supp. 94.

A certificate of convenience and a necessity should not be granted where it appears that the proposed railroad, 12 miles in length, which is intended to be operated as an independent road, would furnish railroad facilities to a town of eighteen hundred inhabitants which includes a village of three hundred inhabitants; that other roads run near to such town; that many of the inhabitants could ship their freight more cheaply and more conveniently over the existing lines; that all the passenger travel is now conducted by a stage coach running once a day between the proposed termini of the road; that the cost of construction and equipment would exceed the proposed capital stock and it seems doubtful if the road could pay running expenses.—*People ex rel. Potter v. Board of R. R. Comrs.*, 124 App. Div. (N. Y.) 47, 108 N. Y. Supp. 288.

The N. Y. Board of Railroad Commissioners had no authority to issue a certificate of public convenience and a necessity to a corporation

until it was furnished with a receipt showing that such corporation had paid the tax required by the N. Y. Tax Law, § 180, as amended.—*People ex rel. N. Y. C. & H. R. R. Co. v. Pub. Serv. Commission*, 122 App. Div. (N. Y.) 283, 106 N. Y. Supp. 968.

A certificate of convenience and necessity of a trolley road about four miles long should not be refused merely because there is doubt in the minds of the N. Y. Board of Railroad Commissioners whether the road would be a paying one, it appearing that the construction of the road is desirable and necessary.—*Matter of Ticonderoga Union Term. R. Co.*, 116 App. Div. (N. Y.) 56, 101 N. Y. Supp. 107.

That a proposed terminal railroad will divert a large quantity of traffic from the streets of a populous district, and effect a substantial saving of time and money in handling freight, will sustain a finding of the N. Y. Board of Railroad Commissioners that public convenience and necessity require the construction of such road.—*People ex rel. Terminal R. Co. v. Board of R. R. Comrs.*, 53 App. Div. (N. Y.) 61, 65 N. Y. Supp. 597; *affd.* 164 N. Y. 572, 58 N. E. 1091.

The refusal of local authorities to permit the building of a street surface railway in certain places, and consequent necessity of making several changes from the route indicated in the articles of association, do not require the N. Y. Board of Railroad Commissioners to refuse the certificate of convenience, where it appears that the alterations are not considerable, and that the same considerations of convenience which urged the building of the road on the original route would be subserved by building it on the altered route.—*People ex rel. L. I. R. Co. v. Board of R. R. Comrs.*, 42 App. Div. (N. Y.) 366, 59 N. Y. Supp. 144.

That a proposed railroad would enhance the value of Adirondack Park lands soon to be acquired by the state, is not a valid ground for denying it a certificate of necessity.—*Matter of Long Lake R. Co.*, 11 App. Div. (N. Y.) 233, 42 N. Y. Supp. 125.

That each of two connecting roads were incorporated on the same day by the same persons and have a length of ten miles each, is not a ground for denying a certificate of necessity.—*Matter of Long Lake R. Co.*, 11 App. Div. (N. Y.) 233, 42 N. Y. Supp. 125.

If the convenience and accommodation of the locality would be promoted by a proposed road, the N. Y. Board of Railroad Commissioners should grant it a certificate of necessity, unless important public interests would be unfavorably affected.—*Matter of Long Lake R. Co.*, 11 App. Div. (N. Y.) 233, 42 N. Y. Supp. 125.

Where a proposed railroad practically parallels existing roads and would impair the value of property invested in such roads without material improvement in facilities afforded the public, the N. Y. Board

of Railroad Commissioners is justified in denying a certificate of public convenience and necessity.—*Matter of Kings, Q. & S. R. Co.*, 6 App. Div. (N. Y.) 241, 39 N. Y. Supp. 1004.

Local sentiment is not a reason for granting or withholding a certificate of necessity.—*Matter of Amsterdam, J. & G. R. Co.*, 86 Hun (N. Y.), 578, 33 N. Y. Supp. 1009.

Defects in service or the charging of exorbitant rates do not make a case for granting a certificate of necessity to a new railroad, as the law provides remedies for those abuses.—*Matter of Amsterdam, J. & G. R. Co.*, 86 Hun (N. Y.), 33 N. Y. Supp. 1009.

Multiplication of grade crossing, etc., is a ground on which the N. Y. Board of Railroad Commissioners may, in the exercise of its discretion, refuse a certificate of necessity.—*Matter of New Hamburg & P. C. R. Co.*, 76 Hun (N. Y.), 76, 27 N. Y. Supp. 664.

[6] — Review of determination.

Judicial review of orders generally,—see ante, § 23, notes [5]–[9].

A decision of the N. Y. Board of Railroad Commissioners granting a certificate of public convenience and necessity is judicially reviewable.—*People ex rel. Steward v. Board of R. R. Comrs.*, 160 N. Y. 202, 54 N. E. 697, affg. s. c. 40 App. Div. (N. Y.) 559, 58 N. Y. Supp. 94.

A determination of the N. Y. Board of Railroad Commissioners granting a certificate of convenience and necessity is final as to the owners of the land through which the proposed route would pass.—*People ex rel. Steward v. Board of R. R. Comrs.*, 160 N. Y. 202, 54 N. E. 697, 40 App. Div. (N. Y.) 559, 58 N. Y. Supp. 94.

The rule that a board exercising judicial functions conferred by statute has no interest in maintaining its decision and hence has no right to appear by counsel on appeal therefrom, applies to review of the decision of the N. Y. Board of Railroad Commissioners granting a certificate of public convenience and necessity.—*People ex rel. Steward v. Board of R. R. Comrs.*, 160 N. Y. 202, 54 N. E. 697, affg. 40 App. Div. (N. Y.) 559, 58 N. Y. Supp. 94.

Where the N. Y. Board of Railroad Commissioners has decided questions of fact, and the Appellate Division has unanimously affirmed such decision, the Court of Appeals has no power to review such affirmance, when no question is raised that is not necessarily determined by the decision of the question of fact.—*People ex rel. Loughran v. Board of R. R. Comrs.*, 158 N. Y. 421, 53 N. E. 163, affg. 32 App. Div. (N. Y.) 58, 52 N. Y. Supp. 901.

On an appeal from a decision of the N. Y. Board of Railroad Commissioners refusing to grant a certificate of public convenience and

necessity, the matter comes before the court as an original application to be determined upon the record made before the Board, or upon such further evidence and facts as the court may deem essential in order to enable it to make a proper determination.—*Matter of Rochester, Corning, Elmira Traction Co.*, 118 App. Div. (N. Y.) 521, 102 N. Y. Supp. 1112.

In judicial review of a decision of the state Board of Railroad Commissioners denying a certificate of necessity for a proposed new railway, the burden is on the petitioner to show affirmatively that the commissioners erred in their determination, and the commissioners should be credited with some technical knowledge which this court is not presumed to possess.—*Matter of Auburn & W. R. Co.*, 37 App. Div. (N. Y.) 162, 55 N. Y. Supp. 895; *Matter of Depew & S. W. R. Co.*, 92 Hun (N. Y.), 406, 36 N. Y. Supp. 991; *Matter of Amsterdam, J. & G. R. Co.*, 86 Hun (N. Y.), 578, 33 N. Y. Supp. 1009; *Matter of New Hamburg & P. C. R. Co.*, 76 Hun (N. Y.), 76, 27 N. Y. Supp. 664; *People v. Ulster & D. R. Co.*, 58 Hun (N. Y.), 266, 12 N. Y. Supp. 303.

[7] Consents of property owners. — Necessity.

Constitutional provisions as to consents of abutting owners,—see N. Y. Const., Art. III, § 18, as amd. in 1901.

Whether giving of consents is a legislative function, see ante, § 4, note [18].

Effect of traffic agreement on necessity for consents of abutting owners, see ante, § 35, note [33].

Power of railroad to permit another to use its tracks without consent of abutting owners,—see post, § 54 note [4].

When a street railroad corporation applies for and obtains the approval of the N. Y. Board of Railroad Commissioners to a change of motive power not as to the entire route as a whole, but as to segregated and distinct sections of the route, the motive power can not be changed as to any one of these sections until and unless it shall have obtained the consent of the owners of one-half the property bounded upon the particular section as to which a change of motive power is to be effected.—*St. Michael's P. E. Ch. v. Forty-second St. M. & St. N. A. R. Co.*, 26 Misc. (N. Y.) 601, 57 N. Y. Supp. 881.

[8] — Report of commissioners in lieu of consent.

Under L. 1884, ch. 252, a street railroad corporation is not limited to one application for the appointment of commissioners to determine whether the road should be constructed through the streets.—*Matter of People's R. Co.*, 112 N. Y. 578, 20 N. E. 367.

An application by a street railroad corporation for the appointment of commissioners under L. 1884, ch. 252, to determine whether the road should be constructed through the streets may precede the giving of consents by local authorities.—*Matter of People's R. Co.*, 112 N. Y. 578, 20 N. E. 367.

The proceedings before the court for confirmation of the report of the commissioners in lieu of the consent of the required proportion of property-owners, are not merely formal, but are under an original jurisdiction and involve a review of the whole case, in the exercise of a discretion not reviewable in the Court of Appeals.—*Matter of Kings Co. Elev. R. Co.*, 82 N. Y. 95; explained 112 N. Y. 72.

Upon a motion to confirm the report of commissioners appointed in lieu of property holders' consents, only fraud or manifest irregularity, but not erroneous rulings as to evidence, etc., will justify the court in sending it back for a rehearing or to new commissioners.—*Matter of Nassau Cable Co.*, 36 Hun (N. Y.), 272.

[9] Consents from other lines.

A lessee of a railroad has an interest therein which entitles it to prevent by legal process any unlawful molestation of its enjoyment of the leased property. It may enjoin an unauthorized crossing of the track by that of another company.—*Pennsylvania Co. v. Lake Erie, B. G. & N. R. Co.*, 146 Fed. 446.

No surface street railroad shall be constructed upon a street where such a road already has been built, without the consent of owners of the latter.—*Matter of Thirty-fourth St. R. Co.*, 102 N. Y. 343, 7 N. E. 172.

[10] Consents by local authorities—In general.

Constitutional provisions as to consents of local authorities,—see N. Y. Const., Art. III, § 18, as amd. in 1901.

Certificate of convenience and necessity not a prerequisite to granting of local consents,—see ante, note [2].

A city ordinance which provides as follows: "Be it ordained, by the Common Council, that the Delaware, Lackawanna and Western Railroad Company be and hereby is granted the right and consent to construct and operate a switch or switches, track or tracks across the extension of Schuyler Street . . ." does not authorize the construction of an elevated structure across the said street, as in order to erect and maintain a structure across a street, there must be authority to erect and maintain the identical structure in question.—*Delaware, L. & W. R. Co. v. Syracuse*, 157 Fed. 700.

Where the power to grant consents to a railroad to cross a city street is vested in the common council of that city, subject to the approval

or disapproval of the mayor, the granting by the fire marshal of a permit to erect a trestle across a street, even when approved by the mayor, does not amount to a consent by the common council that the trestle may be erected and put in operation.—*Delaware, L. & W. R. Co. v. Syracuse*, 157 Fed. 700.

N. Y. R. R. L., § 11, providing in part that "such highway may be carried by it [the railroad company] under or over its track as may be found most expedient," cannot be held to authorize a railroad company to build a trestle over a public highway in a city or village for the purpose of obtaining access to its coal pockets, without the consent of the city authorities.—*Delaware, L. & W. R. Co. v. Syracuse*, 157 Fed. 700.

The requirement of N. Y. R. R. L., § 93, as amended in 1901, that the consent of local authorities of a city to the construction of a street railway therein must contain a condition for the sale of the franchise at public auction, applies only to cities having a population of 1,250,000 inhabitants.—*Kuhn v. Knight*, 190 N. Y. 339, 83 N. E. 293, affg. s. c. 115 App. Div. (N. Y.) 837, 101 N. Y. Supp. 1.

In order to justify the maintenance by a railroad of an elevated structure across a public street, the authority must be so clear and specific as to justify the identical structure which was erected.—*Delaware, L. & W. R. Co. v. Buffalo*, 158 N. Y. 266, 53 N. E. 44.

Interpretation and application of the constitutional and statutory provisions as to the giving of consents, etc.—*Delaware L. & W. R. Co. v. Buffalo*, 158 N. Y. 266, 53 N. E. 44; *Matter of Third Ave. R. Co.*, 121 N. Y. 536, 24 N. E. 951, 9 L. R. A. 124, revg. s. c. 56 Hun (N. Y.), 537, 9 N. Y. Supp. 833; *Matter of People's R. Co.*, 112 N. Y. 578, 20 N. E. 567; *Matter of Metropolitan Transit Co.*, 111 N. Y. 588, 19 N. E. 645, affg. s. c. 1 N. Y. Supp. 114; *People v. O'Brien*, 111 N. Y. 30, 18 N. E. 692; *Matter of Thirty-fourth St. R. Co.*, 102 N. Y. 343, 7 N. E. 172, revg. s. c. 37 Hun (N. Y.), 442; *N. Y. Cable Co. v. Mayor*, 104 N. Y. 1, 10 N. E. 332; *Kunz v. Brooklyn Heights R. Co.*, 25 Misc. (N. Y.) 334, 54 N. Y. Supp. 176; *Matter of Broadway Surface R. Co.*, 34 Hun (N. Y.), 414.

Where the legislature, in the exercise of its sovereign power, has regulated the subject-matter, it is not competent for other persons charged with the duty of giving consent to the performance of a particular act to impose other or different conditions, as such conditions will be deemed opposed to a sound public policy.—*Beekman v. Third Ave. R. Co.*, 153 N. Y. 144, 47 N. E. 277, affg. s. c. 13 App. Div. (N. Y.) 279, 43 N. Y. Supp. 174; *Dusenberry v. N. Y. W. & C. Traction Co.*, 46 App. Div. (N. Y.) 267, 61 N. Y. Supp. 420.

A street railway cannot be built without the consent of the municipal authorities who may refuse to give such consent in their dis-

cretion, and impose conditions in so doing.—*People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255n; *People v. Barnard*, 110 N. Y. 548, 18 N. E. 354.

Under L. 1886, ch. 65, as amended, the power of the municipal authorities to grant or withhold their consent to the construction of a street railroad is absolute, and they may impose any reasonable conditions as to the terms on which the consent will be given.—*People ex rel. W. S. St. R. Co. v. Barnard*, 110 N. Y. 548, 18 N. E. 354.

The consent of the common council of New York City to the acquisition by condemnation of certain lands need not be obtained in advance of the proceedings against the individual owners.—*Matter of N. Y. C. & H. R. R. Co.*, 77 N. Y. 248.

A grant of the right to construct a railroad, made by a mayor and common council without power or authority, is void.—*Coleman v. Second Ave. R. Co.*, 38 N. Y. 201.

Greater New York Ch. (L. 1901, p. 107, ch. 466), § 242, as amended by L. 1905, ch. 629, § 14, does not authorize the Board of Estimate and Apportionment to grant a permit to a department store to build and operate a spur track in the street and to connect the store with the street railway and so to facilitate the handling of freight.—*Hatfield v. Strauss*, 189 N. Y. 208, 82 N. E. 172, affg. 117 App. Div. (N. Y.) 671, 102 N. Y. Supp. 934.

The consent of the local authorities may be obtained either before or after that of the property owners.—*Matter of Broadway Surface R. Co.*, 34 Hun (N. Y.), 414.

[11] — Rescission or withdrawal.

It seems that a city has the right to rescind or withdraw a consent to a railroad crossing a street in a particular manner at any time before the consent has been acted upon by the actual construction of the thing authorized.—*Delaware, L. & W. R. Co. v. Syracuse*, 157 Fed. 700.

Where a city ordinance permits a railroad to cross a street at grade with switches and tracks, the existence of switches so constructed in good faith while the ordinance is in full force and effect, cannot be made unlawful by the subsequent repeal of the ordinance.—*Delaware, L. & W. R. Co. v. Syracuse*, 157 Fed. 700.

[12] Duty of lessees of street railroads to obtain consents.

Even if one street railroad has the power to lease its road to another, that does not obviate the absolute necessity that the latter should comply with that statutory requirement and procedure as to consents of local authorities and abutting owners.—*Colonial City Traction Co. v. Kingston City R. Co.*, 153 N. Y. 540, affg. s. c. 15 App. Div. (N. Y.) 195, 44 N. Y. Supp. 492; reargument denied, 154 N. Y. 493.

[13] Franchise. — Power to grant.

Keeping of "Street Franchise Book" by city clerk of The City of New York,—see Greater N. Y. Ch., § 28, as amd. by L. 1905, ch. 629, § 2.

Vote upon ordinances of Board of Aldermen of The City of New York Granting or terminating franchises,—see Greater N. Y. Ch., § 30.

Ordinances of municipalities consolidated to form Greater New York, relating to franchises or grants of rights, are subject to modification, amendment or repeal by the Board of Estimate and Apportionment,—see Greater N. Y. Ch., § 41.

Ordinances made by the Board of Aldermen of The City of New York as to the use of streets, do not affect any franchise or grant approved or authorized by the Board of Estimate and Apportionment, or by the former Board of Rapid Transit Railroad Commissioners,—see Greater N. Y. Ch., § 50, as amd. by L. 1905, ch. 629, § 9.

As to granting of franchises by The City of New York,—see Greater N. Y. Ch., §§ 71-77.

Powers of Board of Estimate and Apportionment as to franchises,—see Greater N. Y. Ch., § 242, as amd. by L. 1905, ch. 629, § 14.

The consolidation to form Greater New York did not extend franchises previously granted by any of the constituent parts,—see Greater N. Y. Ch., § 1538.

Annual reports of interstate carriers must contain information concerning franchises,—see Interst. Com. Act, § 20, post, Appendix B.

Powers of former Board of Rapid Transit Railroad Commissioners over franchises, etc.,—see N. Y. Rap. Tr. Act, §§ 4, 5, 7, 11, 14, 32, 32a, 34, 34a-e, 38; L. 1906, ch. 109, §§ 1-9, post, Appendix A.

Power of the state to regulate franchises,—see ante, § 1, note [2].

Franchises as property,—see ante, § 1, note [8].

Effect of reservation of power to amend charters on power to regulate franchises,—see ante, § 1, note [12].

Whether granting new franchises impair obligation of contract as to existing franchises,—see ante, § 1, note [15].

Lease of road includes use of franchise of lessor,—see post, § 54, note [9].

Action to annul franchise,—see post, § 54, note [17].

Distinction between franchises to be a corporation and franchises to operate a railroad,—see post, § 55, note [2].

The giving of consents, franchises, etc., is a legislative function.—*Ghee v. Northern Union Gas. Co.*, 158 N. Y. 510, 53 N. E. 692, revg. s. c. 34 App. Div. (N. Y.) 551, 56 N. Y. Supp. 450.

The legislative power as to granting of franchises to construct and operate a street railway, is subject to the limitation that the franchise

must be granted for public and not for private purposes, or at least public considerations must enter into every valid grant of a right to appropriate a public street for railroad uses.—*Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307.

The right to construct and operate a street railway is a franchise which must have its source in the sovereign power.—*Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 305.

N. Y. Const., Art. 3, § 18, does not preclude the legislature from imposing other and further conditions upon which street railways may be constructed, not inconsistent with the provisions of the Constitution.—*Matter of Application of Thirty-fourth St. R. Co.*, 102 N. Y. 343, 7 N. E. 172.

The city of New York is not authorized by its general power over the streets, to grant a franchise for a street railway therein.—*Davis v. Mayor*, 14 N. Y. 506.

The power to grant a franchise for constructing and operating a street railroad is not vested in the city of New York, but only in the legislature, though under the N. Y. Constitution the consent of the city is necessary before such grant can become operative. The legislature may prescribe the manner in which the city authorities shall act upon the matter, and the requisites of their consent. The local authorities must comply with such conditions, and can impose no other or further conditions.—*Beekman v. Third Ave. R. Co.*, 13 App. Div. (N. Y.) 279, 43 N. Y. Supp. 174; *affd.* 153 N. Y. 144, 47 N. E. 277.

It is a legislative prerogative to decide whether an enterprise or scheme of improvement be of such public utility as to justify a resort for its furtherance to the exercise of the power of eminent domain. Primarily, the judiciary has no concern in such matters. If the public interest be involved to any substantial extent, and if the project contemplated can, in any fair sense, be said to be promotive of the welfare or convenience of the community, the legislative sanction of such project is a determination from which there is no appeal, and over which no other branch of the government has any supervision whatever. Whether a road will subserve public or private needs, is an inquiry addressed exclusively to the law-making power, whose answer, according to the genius of our government, must be final and irreversible.—*Tidewater Co. v. Coster*, 18 N. J. Eq. 518.

[14] — Purposes of franchises.

The franchises of a railroad corporation are rights or privileges which are essential to its operation and without which the road and its works cannot be successfully operated.—*Morgan v. Louisiana*, 93 U. S. 217.

It is plainly contrary to public policy that a franchise granted for public purposes should be used as a mere cover for a private enterprise.—*Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 305.

[15] — Construction.

Whether a forfeiture clause in an act of incorporation of a public service corporation is self-executing depends wholly on the language employed, which must be strong and unmistakable to that effect.—*Matter of N. Y. & L. I. Bridge Co.*, 148 N. Y. 540, 42 N. E. 1088.

[16] — Operation, termination and suspension of franchises.

A franchise to operate a railroad between two points is not satisfied by the building and operating of a part of such line, and a complete abandonment of the remainder.—*Brooklyn & R. B. R. Co. v. L. I. R. Co.*, 72 App. Div. (N. Y.) 496, 76 N. Y. Supp. 777; appeal dismissed, 178 N. Y. 593, 70 N. E. 1096.

That a street railroad removes its tracks from, and abandons for a time, a part of its road does not forfeit or terminate its franchise, so as to prevent it from relaying its tracks.—*Trelford v. Coney I. & B. R. Co.*, 6 App. Div. (N. Y.) 204, 40 N. Y. Supp. 1150.

Refusal to employ its franchises in the service of a particular shipper does not constitute in any sense a suspension of such franchises.—*People ex rel. Ohlen v. N. Y. L. E. & W. R. Co.*, 22 Hun (N. Y.), 533.

[17] Franchise taxes.

The contract and lease providing for the equipment, maintenance and operation of the New York City Subway is not a special franchise within the meaning of N. Y. Tax L., § 2, subd. 3, and even though it were, the same is exempted from taxation by N. Y. Rap. Tr. Act, § 35.—*People ex rel. Interborough R. Tr. Co. v. Board of Tax Commrs.*, — Misc. (N. Y.) —, — N. Y. Supp. —, affd. — App. Div. (N. Y.) —, — N. Y. Supp. —.

The constitutional consents and franchises under which the New York City Subway was constructed and is operated are vested in and belong to the City of New York.—*People ex rel. Interborough Rap. Tr. Co. v. Board of Tax Commrs.*, — Misc. (N. Y.) —, — N. Y. Supp. —, affd. — App. Div. (N. Y.) —, — N. Y. Supp. —.

[18] Unauthorized maintenance of road.

The construction and maintenance of a street railroad by an individual or association of individuals without legislative authority, constitute a public nuisance, and subject the persons maintaining it, not only to indictment, but also to private action in favor of any person sustaining special injury.—*Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 305.

ELEVATED RAILROAD CASES.

Upon the question of interference with the easements of light, air and access of persons owning lands adjoining public streets, through the erection and maintenance of elevated railway structures, the earliest case was *Matter of N. Y. Elevated R. Co.*, 70 N. Y. 327. In this case abutting owners appealed from an order confirming a report of commissioners appointed to determine whether an elevated railroad should be constructed. It was contended that the act authorizing the construction of the road made no provision for compensation to abutting owners. The court held that if there were any private rights in the streets, within the meaning of the Constitution, they must be taken in pursuance to law upon making compensation, but decided that provision for compensation was made by the act.

In the case of *Story v. N. Y. Elevated R. Co.*, 90 N. Y. 122, it was sought to restrain the construction of an elevated railroad on the ground that the construction of such a road would be a taking of the property of the abutting owners without due process of law. It appeared that the abutting owners received their title from the city by grants in which said city covenanted that Front Street, in which the railroad was now sought to be constructed, should be and remain an open street forever.

The court granted the injunction on the theory that the structure to be erected would invade the abutting owners' easements of light, air and access in the streets, which were secured by the grants from the city, and, citing the *N. Y. Elevated R. Co.* case *supra*, the court held:

1. That the plaintiff had the right to have the street kept open for the benefit of his abutting property.
2. That this right constituted an easement which was property.
3. That the structure was inconsistent with the use of the street for street purposes.
4. That plaintiff's property was taken without compensation.

The decision was reached by a vote of four to three, Miller, Earl and Finch, JJ., dissenting, contending that no such property right existed in the easement of light and air as would entitle the abutting owners to relief.

In accord with the decision in the *Story* case were the cases of *Peyser v. N. Y. Elevated R. Co.*, 12 Abb. N. C. (N. Y.) 276; *Glover v. Manhattan R. Co.*, 66 How. Pr. (N. Y.) 77.

The doctrine laid down in the *Story* case was applied in its broadest sense in the case of *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268, 10 N. E. 528, in which the court applied the rule there stated to cases in which the property for the street was taken by condemnation proceedings and there was no covenant by the city that the street should be kept open for street purposes. The railway company was held liable for injuries resulting from smoke, gas, coal-dust, ashes, etc., providing they were destructive of the easements of light, air or access.

This decision was followed in *Wagner v. Metropolitan El. R. Co.*, 104 N. Y. 665, 10 N. E. 535; *Drucker v. Manhattan El. R. Co.*, 106 N. Y. 157, 12 N. E. 568; *Shepard v. Manhattan R. Co.*, 117 N. Y. 442, 23 N. E. 30; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1, 25 N. E. 496, 11 L. R. A. 634n; and *Williams v. Brooklyn El. R. Co.*, 126 N. Y. 96, 26 N. E. 1048.

In the case of *Kane v. N. Y. Elevated R. Co.*, 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 710n, the rule of the *Story* and *Lahr* cases was extended to allow recovery by property owners whose land adjoins streets which were opened during the Dutch possession of the colony, even though under the Civil Law, applicable at that time, no special easements exist in streets in favor of abutting owners.

Upon the question of the elements of damage for which recovery might be had, it was held in *American Bank Note Co. v. N. Y. Elev. Co.*, 129 N. Y. 252, 29 N. E. 302, that noise was an element of damage, while in *Sperb v. Metropolitan El. R. Co.*, 137 N. Y. 155, 32 N. E. 1050, 20 L. R. A. 752n, the rule was laid down that for injuries resulting from the operation as well as those resulting from the maintenance of an elevated structure, there could be recovery.

It was held in the case of *Stroub v. Manhattan R. Co.*, 59 N. Y. Super. 505, that where a double track elevated railroad already exists in a street, the company operating the same will be enjoined from constructing an additional track until the easements of the abutting owners have been acquired.

PARK AVENUE VIADUCT CASES.

The cases known generally as the Park Avenue Viaduct Cases arose upon similar facts in each case. Upon a map filed with the city, a street one hundred feet wide, known as Fourth Avenue, was indicated. Prior to the opening of the street the New York & Harlem Railroad Company obtained the right to lay a double track road through this street; the double track road was constructed, partly upon a viaduct, and in 1872, after the opening of the street by the city, by an act of the legislature the railroad was compelled to make certain changes of grade and was allowed to lay two additional tracks; in 1892 the railroad was required by an act of that year to operate its road over a part of the distance, upon an elevated structure, this structure, being constructed under the supervision and control of the Park Avenue Board, the railroad having no control over the work, and merely paying a portion of the expense.

In the case of *Conabeer v. N. Y. C. & H. R. Co.*, 156 N. Y. 474, 51 N. E. 402, the railroad obtained from the owner of property over which the proposed Fourth Avenue was to pass and lands adjoining the same, a deed of twenty-four feet of land running through the centre of the said street upon which to construct a railroad, but for no other purposes, with the right to slope its embankments or excavations not to exceed a total width of one hundred feet. The act complained of in this case was

the construction of the two additional tracks provided for by the Act of 1872. The court held that the additional width of the viaduct did not impose such an additional burden as would justify holding as a matter of law that the trial court should have enjoined the maintenance of the new structure, and distinguished this case from the elevated railroad cases on the ground that in the elevated railroad cases there was no grant by the abutting owners permitting the use of the street for railroad purposes.

The first decisive case in the Court of Appeals relative to the improvements made under the Act of 1892 was the case of *Lewis v. New York & Harlem R. Co.*, 162 N. Y. 202, 56 N. E. 540. In this case the court held that the old viaduct had remained so long without objection that the railway had acquired a prescriptive right to have the same stand forever so far as the plaintiff was concerned, and that she could claim no damages for the existence of the old structure nor for any new structure erected in its place within the same lines. It was held further that inasmuch as the new structure was built under the affirmative command of a statute by the Park Avenue Board and the railroad neither carried on, nor had the right to hinder or interfere with the work, such road was not liable for damages occasioned by the viaduct while in process of construction. The liability of the railroad began when the trestle was complete and was first put in use. The plaintiff was held entitled to recover damages occasioned by that portion of the trestle which stood wholly without the lines of the old viaduct, taking into consideration, however, the benefits of access conferred by the removal of the old structure.

Similar decisions were made in the cases of *Taylor v. N. Y. & H. R. Co.*, 27 App. Div. (N. Y.) 190, 50 N. Y. Supp. 697; *Welde v. N. Y. & H. R. Co.*, 28 App. Div. (N. Y.) 379, 51 N. Y. Supp. 290; *Birrell v. N. Y. & H. R. Co.*, 41 App. Div. (N. Y.) 506, 58 N. Y. Supp. 650; *Sander v. N. Y. & H. R. Co.*, 58 App. Div. (N. Y.) 622, 69 N. Y. Supp. 155; *Larney v. N. Y. & H. R. Co.*, 62 App. Div. (N. Y.) 311, 71 N. Y. Supp. 27.

The *Lewis* case was followed by the case of *Fries v. N. Y. & H. R. Co.*, 169 N. Y. 270, 62 N. E. 358, revg. s. c. 27 App. Div. (N. Y.) 577. In this case the court allowed the abutting owner no damages either for the construction or for the maintenance of the elevated structure, placing its decision on the ground that the railroad could not resist the improvement, nor could it refuse to operate trains on the viaduct when completed, without forfeiting its rights as a corporation. The court maintained that the work was a public improvement and applied the rule that where the property of an abutting owner is damaged or his easements interfered with in consequence of a work of improvement in a street conducted under lawful authority, he is without redress even though there is no provision for compensation made by the statute authorizing the improvement.

O'Brien, J., who wrote the prevailing opinion attempted to distinguish this case from the *Lewis* case, but Martin, J., in a separate opinion, en-

tertained the view that the case as decided was in conflict with, and intended as a limitation upon, the doctrine of the *Lewis* case.

The doctrine laid down in this last case was followed in the case of *Muhlker v. N. Y. & H. R. Co.*, 173 N. Y. 549, 66 N. E. 558, revg. s. c. 60 App. Div. (N. Y.) 621, 69 N. Y. Supp. 910, in which Parker, J., said:

"Although at the time of the decision of the *Lewis* case we accepted as sound the proposition that, when defendant commenced to use the steel viaduct, it started a new trespass upon the rights of abutting owners for which it could properly be held liable, subsequent reflection persuaded the majority of the court that this was error."

The court held the statute of 1892 constitutional, and distinguished this case from the elevated railroad cases on the ground that the improvement under this Act was for the public benefit and not for the exclusive use of the railroad, which the legislature had a right to authorize, while in the elevated railroad cases the state merely granted the right to a corporation to make an additional use of the street.

This case, however, was reversed in the Supreme Court of the United States, in 197 U. S. 544, 25 Sup. Ct. R. (U. S.) 522, where it was decided that the *Story* and *Lahr* cases were decisive of the questions then presented and it was held:

"That the permission or command of the State can give no power to invade private rights, even for a public purpose, without payment of compensation."

The distinctions which the Court of Appeals had attempted to make between this class of cases and the elevated railroad cases were rejected. However, the court based its decision on the ground that when the plaintiff acquired his title to the abutting property, the *Story* and *Lahr* cases were the law of the land and assured him that his easements were protected and could not be taken without compensation, and, therefore, he was entitled to recover. The court did not feel called upon to discuss the power of courts to limit or modify their decisions, but stated that such power could not be exercised to take away rights which had been acquired by contract and had come under the protection of the Federal Constitution.

The case of *Dolan v. N. Y. R. Co.*, 175 N. Y. 504, 67 N. E. 612, revg. s. c. 74 App. Div. (N. Y.) 434, 77 N. Y. Supp. 815, while refusing damages resulting from the operation of the structure, allowed damages for the construction and maintenance of stations directed to be built by the Act of 1892, the distinction being that in the former case the statute directed a great public improvement, while in the latter case the state merely required the railroad to provide suitable and proper facilities to enable patrons to enter and alight from their trains. Followed in *McCarthy v. N. Y. & H. R. Co.*, 175 N. Y. 504, 67 N. E. 1085, revg. s. c.

74 App. Div. (N. Y.) 629, 77 N. Y. Supp. 1132; *Pape v. N. Y. & H. R. Co.*, 175 N. Y. 367, 67 N. E. 1086, revg. s. c. 74 App. Div. (N. Y.) 175, 77 N. Y. Supp. 725; *Ketcham v. N. Y. & H. R. Co.*, 177 N. Y. 247, 69 N. E. 533, revg. s. c. 76 App. Div. (N. Y.) 619, 79 N. Y. Supp. 1135.

In order to make provision for the damages caused by the erection of the structure, L. 1901, ch. 729, was passed which authorized payment by the State of claims for damages arising out of the improvement, so far as the acts and operations were performed by or under the direction of the Park Avenue Board.

This Act was construed in *Sander v. State*, 182 N. Y. 400, 75 N. E. 234, in which it was held that the State was liable only up to the time the railroad company began to run its trains. The court recognized, in this case, the reversal of the *Muhlker* case, and stated that both that case and the *Fries* case had ceased to be authority, and in the case of *Foster v. N. Y. C. & H. R. R. Co.*, 118 App. Div. 143, 103 N. Y. Supp. 531, the court followed the *Lewis* case.

In the case of *Sauer v. City of New York*, 180 N. Y. 27, 72 N. E. 579, 70 L. R. A. 717; affd. 206 U. S. 536, 27 Sup. Ct. R. (U. S.) 686, it appeared that an elevated viaduct had been erected for street purposes, and it was held that while abutting owners have easements of light and air as against the erection of an elevated roadway by or for a private corporation for its exclusive purposes, they have no such easements as against the erection and maintenance of any structure which may be erected upon the street to subserve the public use.

Where a railroad has, as against an owner of property adjoining a highway, a merely prescriptive right in the street, it cannot change its tracks from the surface to an elevated structure without compensating such land owner for the additional interference with the easements of light, air and access.—*Leffman v. L. I. R. Co.*, 120 App. Div. 528.

The measure of damage for interference with the easements of an abutting owner is the amount of difference between the actual market value of the property and what it would have been worth had there been no interference with the easements.—*Bohm v. Metropolitan Elevated R. Co.*, 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344.

In estimating the value of an easement of light, air or access, it is impossible to consider it as a piece of property separate from the land to which it is appurtenant, and the right to compensation is measured by the damages which the abutting property sustains in consequence of the loss of the easement, taking into consideration the advantages derived from the existence of the structure.—*Newman v. Metropolitan El. R. Co.*, 118 N. Y. 618, 23 N. E. 901, 7 L. R. A. 289n.

The interference with the easements of light, air and access is a continuing wrong. A lapse of six years after the first interference, bars an action founded upon such act, but new causes of action, founded upon the continuing act, arise, which are enforceable at any time within six years

thereafter.—*Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788.

A taxpayer of a city has no standing to bring a suit to restrain the erection of an elevated railroad structure in a street where he does not claim to be the owner of property abutting on that street.—*Gallagher v. Keating*, 40 App. Div. (N. Y.) 81, 57 N. Y. Supp. 632, 1123.

Upon the erection of an elevated railroad in a public highway in front of leased property, there is a trespass upon the interest of the landlord in the street affecting his reversion, and a trespass upon the tenant's interest in the street which affects his right to the use and occupation of the premises, giving to each a separate and distinct cause of action against the trespasser.—*Burke v. Manhattan R. Co.*, 120 App. Div. (N. Y.) 684.

On the question of title by prescription, the two latest cases are *Hindley v. Manhattan R. Co.*, 185 N. Y. 335, 78 N. E. 276, revg. s. c. 103 App. Div. (N. Y.) 504, 93 N. Y. Supp. 53; and *Scallon v. Manhattan R. Co.*, 185 N. Y. 359, 78 N. E. 284, revg. s. c. 112 App. Div. (N. Y.) 262, 98 N. Y. Supp. 272.

§ 54. Transfer of franchises or stocks; * [consent of commission required; holding companies].—No franchise nor any right to or under any franchise, to own or operate a railroad or street railroad shall be assigned, transferred or leased, nor shall any contract or agreement with reference to or affecting any such franchise or right be valid or of any force or effect whatsoever, unless the assignment, transfer, lease, contract or agreement shall have been approved by the proper commission. The permission and approval of the commission, to the exercise of a franchise under section fifty-three, or to the assignment, transfer or lease of a franchise under this section shall not be construed to revive or validate any lapsed or invalid franchise, or to enlarge or add to the powers and privileges contained in the grant of any franchise, or to waive any forfeiture.

No railroad corporation, or street railroad corporation, domestic or foreign, shall hereafter purchase or acquire, take or hold, any part of the capital stock of any railroad corporation or street railroad corporation or other common carrier organized or existing under or by virtue of the laws of this state, unless authorized so to do by the commission empowered by this act to give such consent; and save where stock shall be transferred or held for the purpose of collateral security only with the consent of the commission empowered by this act to give such consent, no stock corporation of any description, domestic or foreign, other than a railroad corporation

*Words in brackets not a part of section heading as enacted.—Ed.

or street railroad corporation, shall purchase or acquire, take or hold, more than ten per centum of the total capital stock issued by any railroad corporation or street railroad corporation or other common carrier organized or existing under or by virtue* of the laws of this state. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation, in violation of any provision of this act, shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such railroad corporation or street railroad corporation, or shall be recognized as effective for any purpose. The power conferred by this section to approve or disapprove a transaction relating to franchises, rights or stock of any railroad corporation or street railroad corporation, or other common carrier, shall be exercised by the commission which is authorized by this act to approve the issue of stock by such railroad corporation or street railroad corporation.

Provisions of the New York Railroad Law relative to the consolidation, lease, sale and reorganization of corporations,—see N. Y. R. R. L., §§ 70–84.

Provisions of New York Rapid Transit Act relative to the transfer of stock, and to increases or reductions in the capital stock of corporations,—see N. Y. Rap. Tr. Act, §§ 19, 20, post, Appendix A.

Jurisdiction of Commissions to approve the issue of stocks, bonds, etc., by railroad corporations,—see post, § 55.

Approval by Commission of transfer of franchises by gas and electrical corporations.—see post, § 70.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

Franchises as property,—see ante, § 1, note [8].

Effect of reservation of power to amend charters on power to regulate franchises,—see ante, § 1, note [12].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Effect of vacancies on power of commission,—see ante, § 4, note [5].

Validity of commission plan of regulation,—see ante, § 4, note [14].

Distinction between franchises to be a corporation and franchises to operate a railroad,—see post, § 55, note [2].

* So in original.

[1] What constitutes "control."

A railroad company contracted to haul the cars of the Pullman Co. on its own lines and "on all roads which it now controls or may hereafter control, by ownership, lease, or otherwise." Said railroad company afterward acquired and became the owner of a majority of the stock of another company.—*Held*, that in view of the fact that the latter company still maintained its separate corporate organization and operated its own road, it was not controlled by the former within the meaning of the contract.—*Pullman Car Co. v. Mo. Pac. R. Co.*, 115 U. S. 587, 6 Sup. Ct. R. (U. S.) 194.

Ownership of a majority of the stock of one street railroad by another does not constitute "control" thereof, under N. Y. R. R. L., § 101.—*Senior v. N. Y. City R. Co.*, 111 App. Div. 39, 97 N. Y. Supp. 645; *affd* 187 N. Y. 559, 80 N. E. 1120.

[2] "Consolidation" and "merger."

Distinction between consolidation and merger of railroad companies.—*Lee v. Atlantic C. L. R. Co.*, 150 Fed. 775.

[3] Public control and validity of statutes.

Whether corporations shall remain separate or be permitted to consolidate is a matter of state regulation and provision.—*Mobile, J. & K. C. R. Co. v. Mississippi*, 210 U. S. 187, 28 Sup. Ct. R. (U. S.) 650.

Section 201 of the Kentucky constitution, forbidding consolidation of stock, franchises, or property, of public utility corporations, the pooling of earnings, or the purchasing, leasing or other control of a competing line, upheld as within the police power of the state.—*Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. R. (U. S.) 714, *affg.* s. c. 97 Ky. 675, 17 Ky. L. R. 427, 31 S. W. 476.

A legislative declaration that upon publication of notice a negotiable security shall no longer be transferable, is not due process of law.—*People v. Otis*, 90 N. Y. 48.

In the absence of congressional action on the subject, the states may regulate the consolidation of interstate railway corporations.—*Boardman v. L. S. & M. S. R. Co.*, 84 N. Y. 157.

An act authorizing railroad corporations of this state to subscribe to the capital stock of the Great Western Railroad of Canada is valid.—*White v. Syracuse & U. R. Co.*, 14 Barb. (N. Y.) 559.

[4] Power to lease or consolidate and validity of leases or consolidations.

Power of railroads to acquire and dispose of grants, franchises, privileges and property,—see N. Y. R. R. L., § 18, subd. 3.

Effect of provision of charter giving right to connect or unite with other lines,—see ante, § 35, note [15].

Plan of consolidation invalid because of over-capitalization,—see post, § 55, note [4].

As to lawfulness of holding companies for ownership of stock of parallel or competing roads, see *Northern Securities Co. v. U. S.*, 193 U. S. 197, 24 Sup. Ct. R. (U. S.) 436.

The charter of a railroad and various Kentucky statutes considered, and held not to authorize the purchase or lease of a competing road, transfer of stock, or joinder of franchises.—*Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. R. (U. S.) 714, affg. s. c. 97 Ky. 675, 17 Ky. L. R. 427, 31 S. W. 476.

If, from reasons of public policy, a legislature declares that a railway company shall not become the purchaser of a parallel or competing line, the purchase is not the less unlawful because the parties let it take the form of a judicial sale.—*Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. R. (U. S.) 714, affg. s. c. 97 Ky. 675, 17 Ky. L. R. 427, 31 S. W. 476.

The right of railways to consolidate, lease or purchase competing lines, etc., discussed, with the holding that where by its charter, the railway is given general power to consolidate with, purchase, lease or acquire the stock of other roads, which has remained unexecuted, it is within the authority of the legislature to declare, by subsequent acts, that this power shall not extend to the purchase, lease or consolidation with parallel or competing lines.—*Pearsall v. Gt. Northern R. Co.*, 161 U. S. 646, 16 Sup. Ct. R. (U. S.) 705.

The power of corporations of one state to constitute themselves a consolidated corporation under the statute of another state and thus avail themselves of the rights given thereby, is as completely dependent on the will of the latter state as is the power of corporations of its own creation to consolidate under its laws.—*Ashley v. Ryan*, 153 U. S. 436, 14 Sup. Ct. R. (U. S.) 865, affg. s. c. 49 Oh. St. 504, 31 N. E. 721.

Unless specially authorized by its charter, or aided by some other legislative action, a railroad company can not, by lease or any other contract turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company, without similar authority, make a contract to receive and operate such road, franchises and property of the first corporation, and such a contract is not among the ordinary powers of a railroad corporation and is not to be presumed from the usual grant of powers in a railroad charter—*Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. R. (U. S.) 1094.

A contract by which a carrier renders itself incapable of performing

its duties to the public, or attempts to absolve itself from its obligation without the consent of the state, is forbidden by public policy, and void.—*Thomas v. West Jersey R. Co.*, 101 U. S. 71.

The courts will not permit a railroad to evade its public responsibilities by a transfer of franchises or properties or any device, disguise or artifice.—*York & Md. L. R. Co. v. Winans*, 17 How. (U. S.) 30.

The organization of a holding corporation and the acquisition by it of a large part of the capital stock of all the corporations operating rapid transit or street railway systems in a city, issuing its own securities in payment therefor is a combination for the creation of a monopoly within the meaning of the N. Y. Stock Corporations Law, § 7.—*Burrows v. Interborough-Metropolitan Co.*, 156 Fed. 389.

The rule that a public service corporation cannot, without the assent of the legislature, transfer its franchise and property to another, and thus disenable itself to perform its duties to the public, does not apply when the transfer is to the public.—*City of Indianapolis v. Consumers' Gas. T. Co.*, 144 Fed. 640.

The provisions of a statute authorizing a corporation to consolidate its capital stock and property with any street railway corporation thereafter incorporated, authorize a consolidation of street railroad corporations which have not yet obtained the necessary consents to the building of the roads located by them, where they both possess capital stock and assets.—*Bohmer v. Haffen*, 161 N. Y. 390, 55 N. E. 1047, affg. s. c. 35 App. Div. (N. Y.) 381, 54 N. Y. Supp. 1030, 22 Misc. (N. Y.) 565, 50 N. Y. Supp. 857.

One street surface railroad may, under the New York statute contract with another, permitting the latter to use its tracks, etc., without the consent of abutting property-owners.—*Ingersoll v. Nassau Elect. R. Co.*, 157 N. Y. 453, 52 N. E. 545, 43 L. R. A. 236, affg. s. c. 89 Hun (N. Y.), 213, 34 N. Y. Supp. 1044.

Substantial consolidations, or forms of merger or common control, which avoid and disregard the statutory permissions and restraints, will be pronounced unlawful.—*People v. North River Sugar Ref. Co.*, 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33n.

A corporation formed under the general railroad act has no authority, without legislative consent, to lease its road, or otherwise absolve itself from its obligation to perform the public functions for which it was incorporated.—*Abbott v. Johnstown, G. & K. H. R. Co.*, 80 N. Y. 27, distinguishing *Norton v. Wiswall*, 26 Barb. (N. Y.) 618.

The right given by L. 1839, ch. 218, to a railroad corporation organized under that act to lease its road is a vested right which could not thereafter be taken or impaired, either by legislative enactment or constitutional change, except in the proper exercise of the right of

eminent domain and of the police power.—*Roddy v. Brooklyn C. & N. R. Co.*, 32 App. Div. (N. Y.) 311, 52 N. Y. Supp. 1025.

Since the laws of this state now permit a railroad corporation to lease itself to another corporation, the court will not consider any reasons which public policy may suggest against such lease.—*O'Connor v. L. I. Tr. Co.*, 15 Misc. (N. Y.) 501, 37 N. Y. Supp. 953.

While it is generally true that a quasi-public corporation can not, by contract, relieve itself from its duties to the public or its obligations to operate its franchise for the public benefit, L. 1839, ch. 218, authorizes a railroad to contract with another for the use of its road.—*Prospect Park & C. I. R. Co. v. Brooklyn, B. & W. E. R. Co.*, 84 Hun (N. Y.), 516, 32 N. Y. Supp. 857; *Woodruff v. Erie R. Co.*, 93 N. Y. 616.

It is the policy of this state to promote and to some extent even compel, agreements for some joint operation of roads which have been connected or united. Such agreements must necessarily infer, to some extent, restrictions on the broad powers and discretion as to the construction and operation of its road conferred by statute upon a railroad company. Such agreements are valid unless the effect of the restrictions prescribed is injurious to the public.—*Prospect Park & C. I. R. Co. v. Brooklyn, B. & W. E. R. Co.*, 84 Hun (N. Y.), 516, 32 N. Y. Supp. 857.

A railroad corporation apparently has no power to lease its road, even with the full assent of its stockholders, in the absence of an enabling statute.—*Marie v. Garrison*, 13 Abb. N. C. (N. Y.) 210.

A license to a street railway company to operate its lines over city streets is not broad enough to permit such company to grant to an interurban electric railway the right to operate within the city over its tracks.—*City of Aurora v. Elgin Traction Co.*, 227 Ill. 485, 81 N. E. 544.

A corporation cannot avoid its duty to give transfers from one line to a connecting line by conveying to another corporation a dry legal title to one of the lines and it is equally impossible to do so by leaving a dry legal title in the hands of the corporation from which it purchased the connecting line.—*Chicago U. Traction Co. v. City of Chicago*, 199 Ill. 579, 65 N. E. 470.

Railroads cannot contract not to perform their public duties, nor by contract, lease or consolidation put themselves in a position where they cannot perform their duties.—*Peoria & R. I. R. Co. v. Coal Valley M. Co.*, 68 Ill. 489.

A corporation cannot lease or dispose of any franchise needful in the performance of its obligations to the state, without legislative consent.—*Block v. Delaware & R. Canal Co.*, 24 N. J. Eq. 455.

A statute giving power to corporations organized thereunder to "acquire and convey, at pleasure, all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation" does not authorize a railroad corporation to alienate its franchises.—*Coe v. Columbus, P. & I. R. Co.*, 10 Oh. St. 372.

The franchises and corporate rights of a railroad corporation are not alienable without express authority of law.—*Coe v. Columbus, P. & I. R. Co.*, 10 Oh. St. 372.

One railroad cannot lease to another, or to private persons, without the consent of Parliament.—*Bemen v. Rufford*, 6 Eng. L. & Eq. 106; *Great Northern R. Co. v. Eastern C. R. Co.*, 12 Eng. L. & Eq. 224; *Winch v. B. L. & C. J. R. Co.*, 13 Eng. L. & Eq. 506.

[5] Powers, duties and obligations as affected by lease.

Orders of Commission binding on successors of companies,—see ante, § 23, note [3].

As to effect of consolidation upon existing obligations.—*Pullman Car Co. v. Mo. Pac. R. Co.*, 115 U. S. 587, 6 Sup. Ct. R. (U. S.) 194.

A corporation having no authority under its own charter to acquire and exercise the rights, powers, and franchises of another corporation, or to carry on the business of such other corporation, does not succeed to such rights, powers and franchises by purchasing the property of the other company, though it be the whole of such property employed by that company in carrying on the business it was chartered to engage in.—*Southern R. Co. v. Mitchell*, 139 Ala. 629, 37 So. 85.

Generally, where one railroad company leases its property to another, the lessee must conform to the requirements of the charter of the lessor in operating the road, but this can only be true where the lessee company, in operating the road in accordance with the charter of the lessor, is not violating its own charter.—*Chicago U. Traction Co. v. City of Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

When one company leases its roads to another, the lessee must, in operating it, be governed by the charter of the lessor.—*People v. St. L. A. & T. H. R. Co.*, 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656.

Public duties owed by a consolidating railroad must be fulfilled by the consolidated railroad.—*Peoria & R. I. R. Co. v. Coal Valley M. Co.*, 68 Ill. 489.

Where a railroad owes a duty to the public it cannot escape its performance by leasing it or placing it in the control of others.—*Rockford, R. I. & St. L. R. R. Co. v. Heflin*, 65 Ill. 366.

That a railway corporation leases its road does not relieve it from its obligations to shippers and the public, especially where its charter does not authorize a lease.—*Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623.

A railroad corporation can not avoid its obligations to the public as a chartered railway company by turning over the operation of its road to another railroad.—*Harbert v. Atlanta & C. A. L. R. Co.*, 74 S. C. 13, 53 S. E. 1001.

[6] Regulative power as affected by consolidation.

Transferability of exemption from public control,—see ante, § 1, note [20].

Effect of reorganization or consolidation upon exemption from public control,—see ante, § 1, note [21].

Leasing of road as affecting public control,—see ante, § 2, note [14].

Power of state to control domestic corporation which has consolidated with foreign corporation,—see ante, § 25, note [10].

As to effect of consolidation of railroads upon the power of the state to regulate them.—*St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. R. (U. S.) 484, affg. s. c. 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452n, and 54 Ark. 116, 15 S. W. 22.

In the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions in restriction of the right of the state to regulate the affairs of its corporation, do not pass to new corporations, succeeding by consolidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee.—*Norfolk & W. R. Co. v. Pendleton*, 156 U. S. 667, 15 Sup. Ct. R. (U. S.) 413, affg. s. c. 86 Va. 1004, 11 S. E. 1062, and 88 Va. 350, 13 S. E. 709.

A state, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and the acceptance of the franchise implies a submission to the conditions without which the franchise could not have been obtained.—*Ashley v. Ryan*, 153 U. S. 436, 14 Sup. Ct. R. (U. S.) 865, affg. s. c. 49 Oh. St. 504, 31 N. E. 721.

[7] Status of company owning entire capital stock of other company.

A railroad company is not doing business in a state, within the meaning of the statute as to service of process, etc., simply because another railroad company, of which it owns practically the entire capital stock, is doing business therein.—*Peterson v. Ch. R. I. & P. R. Co.*, 205 U. S. 364, 27 Sup. Ct. R. (U. S.) 513.

[8] Power of directors and stockholders to make lease.

A lease of one railroad corporation to another, of its road, property, and franchise may be made by its board of directors, and the consent

or ratification of the stockholders is not essential to its validity.—*Beveridge v. N. Y. El. R. Co.*, 112 N. Y. 1, 19 N. E. 489, 2. L. R. A. 648.

Acts making organic or fundamental changes in the character of the business of a corporation, such as the leasing of the property, cannot be done either by the directors alone, or by the shareholders alone.—*Metropolitan El. R. Co. v. Manhattan R. Co.*, 14 Abb. N. C. (N. Y.) 103, 11 Daly (N. Y.), 373.

[9] What included in lease.

The lease of a railroad necessarily includes the use of the franchise of the company owning it.—*People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 417, 46 N. E. 875, revg. s. c. 6 App. Div. (N. Y.) 356, 39 N. Y. Supp. 682.

[10] Interests of stockholders.

A state may provide for the condemnation of minority shares of stock in a railroad where the majority of the shares are held by another railroad corporation, if public interest demands and the improvement of the through facilities afforded by the latter corporation may be a public use.—*Offield v. N. Y. N. H. & H. R. Co.*, 203 U. S. 372, 27 Sup. Ct. R. (U. S.) 72.

If the charter of a railway corporation does not authorize it to transfer its franchise and property to another corporation, the legislature, by sanctioning such transfer, cannot do more than waive the right of the state to object thereto. It could not impair the rights of the stockholders as between themselves, or as between themselves and the corporation.—*City of Knoxville v. Knoxville & O. R. Co.*, 22 Fed. 758.

If a proposed merger of two banking corporations is so unconscionable that it cannot be ratified against the objections of a minority stockholder, equity will enjoin the proposed merger, on the application of such stockholder.—*Colby v. Equitable Trust Co.*, 55 Misc. (N. Y.) 355.

A sale and transfer by the directors of a corporation, of its entire business and all its property except its real estate, is void as against non-consenting stockholders.—*Abbott v. American Hard Rubber Co.*, 20 How. Pr. (N. Y.) 199, 33 Barb. (N. Y.) 578.

A majority of the members of a corporation cannot constitutionally be authorized to divest the interest of a dissenting stockholder, by a transfer of the whole of its property to another company, to be paid for in the shares of such other company, without first giving security for the interests of such dissenting stockholder.—*Louman v. Lebanon V. R. Co.*, 30 Pa. 42.

[11] Actions to restrain or set aside unauthorized agreements.

Where, after transferring railway stock to a corporation in return for its shares, a person becomes a director of the purchasing corporation and participates in acts consistent only with the absolute ownership by it of the stock transferred to it, and does so after an action has been brought to declare the transaction unlawful, his right to rescind and compel restitution of his original stock is lost by acquiescence, if he ever had such right.—*Harriman v. Northern Securities Co.*, 197 U. S. 244, 25 Sup. Ct. R. (U. S.) 493.

Where a stockholder of a holding corporation owning all the stock of certain street railway companies sues the former for relief against its unauthorized action in leasing the property of the street railway companies and otherwise depriving such stockholder of his right to share ratably with the other stockholders in the net earnings of the street railway companies in question, such suit does not concern the internal management of the street railway companies, which therefore are not necessary parties, but such suit may be brought in any court having jurisdiction over the defendant and need not be brought in the state in which defendant was incorporated.—*Saber v. United Traction & Elect. Co.*, 156 Fed. 79.

Where the objection to the acts of a corporation is that they are *ultra vires* without being either *mala prohibita* or *mala in se*, a stockholder cannot maintain an action in his own behalf based on such objection where he himself, with knowledge of the character of the acts, has acquired and accepted pecuniary benefits thereunder.—*Wormser v. Metropolitan St. R. Co.*, 184 N. Y. 83, affg. s. c. 98 App. Div. (N. Y.) 29, 90 N. Y. Supp. 714.

Where the action of the majority of the stockholders is within the corporate powers but is plainly a fraud upon, or in other words, is really oppressive to the minority shareholders, and the directors or trustees have acted with and formed part of the majority, an action may be sustained by one of the minority shareholders suing in his own behalf and in that of all others coming in, to enjoin the action contemplated, and in such action the corporation should be made a party defendant.—*Gamble v. Queens Co. W. Co.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527.

Where directors have no authority to enter into agreements without the consent of stockholders, no expression of dissent by the stockholders is necessary before action is brought to set aside such agreement, because they are void unless ratified.—*Metropolitan El. R. Co. v. Manhattan R. Co.*, 14 Abb. N. C. (N. Y.) 103, 11 Daly (N. Y.), 373.

Where directors act without authority in making agreements and leases, the corporation may repudiate the acts so done, because the stockholders not only may claim, but must claim their rights by and

through the corporation, unless the corporation refuses to assert such rights. Therefore where an action is brought in the name of the corporation and not in the name of a stockholder to set aside a fraudulent agreement entered into by directors, it is not a sufficient objection to urge that the corporation itself is a party to the fraud.—*Metropolitan El. R. Co. v. Manhattan R. Co.*, 14 Abb. N. C. (N. Y.) 103, 11 Daly (N. Y.), 373.

[12] Common directorate.

Where the two corporations which it is proposed to merge have nine directors in common, and both are dominated by the same stockholder, it is the duty of a court of equity to scrutinize with vigilant care a contract between the corporations, especially when the contract has the effect of extinguishing the corporate life of one of the contracting parties.—*Colby v. Equitable Trust Co.*, 55 Misc. (N. Y.) 355.

For discussion of question whether persons who are directors in two corporations are disqualified from acting in respect to a lease of the property or one corporation to the other.—*Metropolitan El. R. Co. v. Manhattan R. Co.*, 14 Abb. N. C. (N. Y.) 103, 11 Daly (N. Y.), 373.

[13] Acts of officers or directors voidable.

An officer of a corporation cannot make an agreement with himself acting on the one part individually and for his own benefit, and on the other part in his fiduciary capacity as an officer of the corporation. The acts and votes of corporate officers are voidable when they are effected by private interests.—*Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152, 76 N. E. 1075.

Every contract entered into by a director with his corporation may be avoided by the corporation within a reasonable time, irrespective of the merits of the contract itself.—*Metropolitan El. R. Co. v. Manhattan R. Co.*, 14 Abb. N. C. (N. Y.) 103, 11 Daly (N. Y.), 373.

[14] Non-performance of functions.

Where a railroad acquires by consolidation two actually or practically parallel lines of road, and can substantially accommodate the people of the state by operating one line between the same points, and can abandon the other line without any serious detriment to any considerable number of people, it should not be compelled to operate both lines at a great sacrifice of money upon the fanciful idea that the sovereignty of the state is wounded by its omission to operate both lines.—*People v. Rome, W. & O. R. Co.*, 103 N. Y. 95, 8 N. E. 369.

If a railroad corporation ceases to operate all or part of its line, its charter is subject to forfeiture.—*People v. Albany & Vt. R. Co.*, 24 N. Y. 261.

A street railway operating under franchise, etc., cannot at its mere will and discretion abandon the operation of its lines or any part thereof.—*State v. Bridgeton & M. Traction Co.*, 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837.

A street railway corporation can cease to perform its proper functions only upon the consent of the state.—*State v. Spokane St. R. Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515.

[15] When dissolution is effected.

Where the stock of a street railway corporation is exchanged for that of another, and by operation of law the former is left without stock, officers, property or franchises, it is dissolved by operation of the law which brings about this state of affairs.—*Rochester R. Co. v. Rochester*, 205 U. S. 236, 27 Sup. Ct. R. (U. S.) 469, affg. s. c. 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773.

A lease by a railroad corporation and a transfer to the lessee of the lessor's capital stock does not terminate the existence of the lessor corporation.—*Matter of N. Y. El. R. Co.*, 63 Hun (N. Y.), 629, 17 N. Y. Supp. 778; affd. on opinion below, 133 N. Y. 690, 31 N. E. 627.

[16] Value of corporate stock.

Good will is an element of the property of a corporation which contributes to the value of a share of the corporate stock.—*People ex rel. U. T. Co. v. Coleman*, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762n; *Colby v. Equitable Trust Co.*, 55 Misc. (N. Y.) 355; *Lindemann v. Rusk*, 125 Wis. 210, 104 N. W. 119.

[17] Action to annul franchise.

In determining whether, under N. Y. Code Civ. Pro. §§ 1797-9, to grant permission to the attorney-general of the state to bring an action to annul the corporate franchise of a public service corporation alleged to have been formed by an unlawful merger a justice of the New York Supreme Court, sitting in Special Term, will follow a decision made by another justice of the same court in Special Term, rather than a decision of the United States District Court for that district.—*Matter of Interborough-Metropolitan Co.*, 56 Misc. (N. Y.) 128, following *Matter of Consolidated Gas Co.*, 56 Misc. (N. Y.) 48, declining to follow *Burrows v. Interborough-Metropolitan Co.*, 156 Fed. 389.

§ 55. Approval of issues of stock, bonds and other forms of indebtedness; *[merger; capitalization of franchises].—A common carrier, railroad corporation or street railroad corporation organized or existing, or hereafter incorporated,

*Words in brackets not a part of section heading as enacted.—Ed.

under or by virtue of the laws of the state of New York, may issue stocks, bonds, notes or other evidence of indebtedness payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations, provided and not otherwise, that there shall have been secured from the proper commission an order authorizing such issue, and the amount thereof and stating that, in the opinion of the commission, the use of the capital to be secured by the issue of such stock, bonds, notes or other evidence of indebtedness is reasonably required for the said purposes of the corporation, but this provision shall not apply to any lawful issue of stock, to the lawful execution and delivery of any mortgage or to the lawful issue of bonds thereunder, which shall have been duly approved by the board of railroad commissioners before the time when this act becomes a law. For the purpose of enabling it to determine whether it should issue such an order, the commission shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents or contracts as it may deem of importance in enabling it to reach a determination. Such common carrier, railroad corporation or street railroad corporation may issue notes, for proper corporate purposes and not in violation of any provision of this or any other act, payable at periods of not more than twelve months without such consent, but no such notes shall, in whole or in part, directly or indirectly be refunded by any issue of stock or bonds or by any evidence of indebtedness running for more than twelve months without the consent of the proper commission. Provided, however, that the commission shall have no power to authorize the capitalization of any franchise to be a corporation or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax on annual charge) actually paid to the state or to a political subdivision thereof as the consideration for the grant of such franchise or right; nor shall the capital stock of a corporation formed by the merger or consolidation of two or more other corporations, exceed the sum of the capital stock of the corporations so consolidated, at the par value thereof, or such sum and any additional sum actually paid in cash; nor shall any contract for consolidation or lease be capitalized in the stock of any corporation whatever; nor shall any corporation hereafter issue

any bonds against or as a lien upon any contract for consolidation or merger. Whenever it shall happen that any railroad corporation shall own or operate its lines in both districts it shall, under this section, apply to the commission of the second district. Whenever it shall happen that any street railroad corporation shall own or operate its lines in both districts, it shall, under this section, apply to the commission of the first district. Any other common carrier not operating exclusively in the first district shall apply to the commission of the second district.

Provisions of the New York Railroad Law relative to the consolidation, lease, sale and reorganization of corporations,—see N. Y. R. R. L., §§ 70–84.

Provisions of the New York Rapid Transit Act as to increase or reduction of capital stock,—see N. Y. Rap. Tr. Act, § 20, post, Appendix A.

Issue of bonds to complete or operate railroads,—see N. Y. Rap. Tr. Act, § 24, subd. 6, post, Appendix A.

Provisions as to bonds for construction of rapid transit railroads,—see N. Y. Rap. Tr. Act, § 34, § 34a–e, post, Appendix A.

Territorial jurisdiction of Commissions generally,—see ante, § 5.

Power of Commission upon investigations generally,—see ante, §§ 19, 20, 45, 48.

Approval by Commission of issues of stock, bonds, etc., of gas and electrical corporations,—see post, § 69.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Who are common carriers,—see ante, § 2, notes [2]–[7].

Compelling production of books and papers,—see ante, § 19, notes [3]–[6].

Punishment of witnesses for contempt,—see ante, § 19, notes [7]–[12].

Commission not bound by technical rules of procedure,—see ante, § 20, note [1].

Immunity of witnesses,—see ante, § 20, notes [2]–[9].

[1] Legislative control.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

Exemptions from public control,—see ante, § 1, notes [16]–[21].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Effect of vacancies on power of Commission,—see ante, § 4, note [5].

Validity of commission plan of regulation,—see ante, § 4, note [14].

Whether power to regulate issuance of stock can be delegated to a Commission,—see ante, § 4, note [17].

A provision of a state constitution prohibiting the issuing of stocks or bonds except for money or property actually received or labor done and forbidding the fictitious increase of stock or indebtedness is intended to protect stockholders against spoliation and to guard the public against securities which are absolutely worthless.—*Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. R. (U. S.) 482.

In the exercise of its undoubted right to enact statutes regulating the increase and disposition of the capital stock of railway corporations, the legislature may pass a statute providing generally for what purposes and upon what terms, conditions and limitations an increase of capital stock may be made, and confer upon a commission the administrative duty of supervising any proposed increase of stock. It may also delegate to the commission the duty of finding the facts in each particular case, and authorize and require it, if it find the existence of facts that bring the case within the statute, to allow the proposed increase; otherwise to refuse it. Any statute, however, which attempts to authorize the commission in its judgment and discretion to allow an increase of the capital stock of a corporation for such purpose and on such terms or conditions as it may deem advisable, is a delegation of legislative power, and void.—*State v. Gt. Northern R. Co.*, 100 Minn. 445, 111 N. W. 289.

[2] Distinction between franchises to be a corporation, and to operate a railroad.

Franchises as property,—see ante, § 1, note [8].

Franchises of gas corporations,—see post, § 68, note [5].

A distinction is to be drawn between a franchise to be a corporation and a franchise, as a corporation, to operate a public utility.—*Vicksburg v. Waterworks Co.*, 202 U. S. 453, 26 Sup. Ct. R. (U. S.) 660; *Commonwealth v. Smith*, 10 Allen (Mass.), 448.

The plaintiff railroad corporation claimed that it had received from its predecessor, by way of mortgage and on foreclosure, all the property of the company, and all its franchises, including the franchise of becoming and being a corporation, in the sense of acquiring the right to organize as such under the act of incorporation as successor to, and substitute for, the original company, precisely as if the act had named them as incorporators and had endowed them with the corporate faculty.—*Held*, that the franchise or right to be a corporation is to be distinguished from the franchise, as a corporation, to operate a railway. The latter may be mortgaged and sold at foreclosure, without the former, which cannot be made a subject of sale or transfer, unless explicitly made so by a statute which also provides a mode of transferring it. A mortgage of the corporate charter, even if made pursuant to a power conferred by statute, confers no right upon purchasers at a judicial sale to continue as the

same corporation, or do more than re-organize pursuant to the laws existing at the time of such re-organization.—*Memphis R. Co. v. R. R. Comrs.*, 112 U. S. 609, 5 Sup. Ct. R. (U. S.) 299.

The attorney-general of the State of New York brought a supplemental action in the name of the people, to wind up the affairs of the Broadway Surface R. Co., which had been dissolved in an action brought by the same official. The attorney-general claimed that the dissolution of the corporation forfeited or invalidated its franchises to maintain and operate a railway in the streets of New York City.—*Held*, that the franchise to lay tracks and operate a railway in public streets is distinguishable and separable from the franchise, charter, or right to be a corporation and maintain a corporate existence. The latter is granted by the state, while the former can be obtained only from the local authorities. The effect of the annulling act and the dissolution of the corporation thereunder was only to terminate the corporate existence and franchise to be a corporation. The franchise to lay tracks, etc., in the streets, and operate a railway, together with the company's traffic contracts, mortgages, etc., survive the dissolution, as corporate property.—*People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255n, revg. s. c. 45 Hun (N. Y.), 519.

The fact that a municipal franchise to a gas corporation to dig into the streets for the purpose of laying gas pipes is limited to a certain term of years in no way limits the period of corporate existence of the corporation.—*Matter of Consolidated Gas Co.*, 56 Misc. (N. Y.) 49.

[3] Validity of issue of securities.

Issue of stock by gas or electrical corporations,—see post, § 69, notes.

The trustees of mortgage bondholders of a railroad corporation which was in financial difficulty purchased the property of the corporation and the same was subsequently conveyed to a newly organized corporation in consideration of the issue of stock and bonds by the latter. The value of the property so conveyed did not equal the par value of the stock issued and it was contended that the issue of bonds was without consideration and void under the provisions of the Illinois Constitution which prohibit the issuing of stock or bonds except for money or property actually received or work actually done.—*Held*, that this transaction did not fall within the prohibition of the Constitution.—*Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. R. (U. S.) 482.

Under the Constitution of Illinois, Art. 11, § 13, providing that no railroad corporation "shall issue any stock or bonds, except for money, labor or property actually received and applied to the purposes for which such corporation was organized. All stock dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation, shall

be void" an issue of stock for the purpose of paying for the construction of the road is not invalid, even though the value of the work did not equal the par value of the stock.—*Lake St. El. R. Co. v. Ziegler*, 99 Fed. 114.

The Public Service Commission can authorize the issue of bonds by railroads only for the purposes specified in N. Y. Pub. Serv. Com. L., § 55, and cannot authorize the issue of bonds in order that a corporation may reimburse itself for money which it has previously taken from its treasury and expended for some lawful purpose.—*Matter of Lehigh & H. R. R. Co.* Decided by the N. Y. Public Service Commission for the Second District, May 7, 1908.

The N. Y. Public Service Commission should not permit a bond issue upon which it is not fairly reasonable to expect that the interest will be paid from the legitimate earnings of the enterprise. *Application of Rochester, Corning, Elmira Traction Co.* Decided by the N. Y. Public Service Commission for the Second District, March 30, 1908.

In order to authorize the issuance of stock, bonds or other evidences of indebtedness payable in more than twelve months, pursuant to Pub. Serv. Com. L. § 55, capital must be secured by the issue, the use of such capital must be necessary for one or more of the four purposes specified in that section and the amount sought to be authorized must be reasonably required for such purpose or purposes. Dividends must, in obedience to N. Y. Stock Corp. L., § 23, be declared only from surplus profits, which belong to the corporation and not to the stockholders until such time as the dividend is declared. By the declaration of a dividend payable at a future time no capital is secured to the corporation, and therefore the issuance of script dividends, which are interest-bearing warrants evidencing the right of stockholders to receive at a future time a dividend declared at the time of the issuance, is unwarranted and can not be authorized.—*Matter of the Petition of the Erie R. Co.* Decided by the N. Y. Public Service Commission of the Second District, Feb. 27, 1908.

When negotiable securities issued by a corporation without warrant of law are not void.—*Peoria & S. R. Co. v. Thompson*, 103 Ill. 187.

[4] Validity of plan of consolidation.

See, also, ante, § 54, note [4].

A plan of consolidation examined and held to violate the provisions of statute that the stock of the consolidated corporation shall not exceed the total stock of the corporations consolidating.—*People v. Boston, H. T. & W. R. Co.*, 12 Abb. N. C. (N. Y.) 230.

[5] Preferred stock.

The holders of the "preferred and guaranteed stock" of the defendant corporation were entitled to preferred and guaranteed dividends, at the

rate of 10 per cent. per annum, "before any dividend was paid on the other stock of said company."—*Held*, that they are entitled to that sum, payable only out of the earnings of the company which are legally applicable to the payment of dividends.—*Taft v. H. P. & F. R. Co.*, 8 R. I. 310.

When a railway corporation raises capital on preference shares, it is in fact borrowing the money, although the lender be clothed with many of the privileges of a shareholder.—*Crawford v. Northeastern R. Co.*, 3 Jurist N. S. (Eng.) Pt. 1, 1093.

[6] Application for authority to issue bonds.

Upon an application by a railroad corporation, under New York Public Service Commission L., § 55, for authority to issue bonds secured by a mortgage, the terms of the mortgage, the rate of interest to be paid on the bonds, and the price at which it has been arranged they shall be sold should be definitely specified by the applicant who should also present a copy of the mortgage actually intended to be issued.—*Application of Greenwich & Johnsonville R. Co.* Decided by the New York Public Service Commission of the Second District, Feb. 18, 1908.

A railroad corporation made application to the New York Public Service Commission of the Second District for authority to issue bonds, secured by mortgage, to the extent of \$1,000,000, bearing not to exceed 5 per cent. interest, with part of which it was proposed to retire its funded debt of \$500,000 bearing 4 per cent. interest, and maturing in about fourteen years from the time of application.—*Held*, that in the absence of such definite and approved arrangements to effect the exchange as would save the company from loss in the transaction, such an arrangement did not commend itself to the Commission.—*Application of Greenwich & Johnsonville R. Co.* Decided by the New York Public Service Commission of the Second District, Feb. 18, 1908.

[7] Control of Commission over issues of stock and bonds.

Upon an application under N. Y. Pub. Serv. Com. L., § 55, for permission to issue bonds, the Commission must always inquire what is to be done with the money to be secured by the issue of the bonds and must be satisfied that it is reasonably required for one or more of the purposes specified in the statute and that it is to be used in the future for such purpose or purposes.—*Matter of Lehigh & H. R. R. Co.* Decided by the N. Y. Public Service Commission for the Second District, May 7, 1908.

Upon an application by a railroad corporation under N. Y. Pub. Serv. Com. Law, § 55, to be allowed to issue stock and bonds, the Commission

must first ascertain the cost of the property proposed to be acquired and the facilities proposed to be constructed. In the case of the construction of a new railroad, evidence must be exacted from the applicant showing the location of the line, cost or estimated cost of rights of way, of the grading, rails, ties, tracks, laying, ballasting, bridges, culverts, fences, and all other details which go to make up the completed roadway. In the case of an electric surface railroad, further inquiry must be made into the cost of the power plant, of all machinery and fixtures connected therewith, the transmission lines, the signal system, stations, platforms, necessary rolling stock and other constructions indispensable to the operation of the road, and in this inquiry it is necessary to take into consideration unit prices and quantities of all the articles which enter into the construction. Besides the cost of construction, the Commission must ascertain: (1) the expense of organization, (2) the incorporation tax, (3) the expense of obtaining a certificate of public convenience and a necessity, (4) the preliminary engineering expenses, (5) the expense of procuring the authorization of issue of stock and bonds, (6) the expense of marketing the securities, (7) discount upon the bonds if they cannot be sold at par, (8) interest on the bond issue prior to the beginning of operations and during the period of construction, (9) the compensation of officers of the road during the construction period, (10) incidental expenses during the construction period, (11) expense of obtaining local franchises and consents. In addition there should be provided upon the commencement of operation a fair working capital and a reasonable amount should be allowed for services in promoting the enterprise.—*Application of Rochester, Corning, Elmira Traction Co.* Decided by the N. Y. Public Service Commission for the Second District, March 30, 1908.

In determining under N. Y. Pub. Serv. L., § 55, how the capitalization of a street railway company shall be divided between stocks and bonds, the Commission will find the proper amount of the bond issue by estimating the probable gross earnings to accrue from the operation of the road, the probable operating expenses, the taxes and the depreciation charge, and any excess of earning above the aggregate expense will represent the sum which is applicable to the payment of fixed charges. *Application of Rochester, Corning, Elmira Traction Co.* Decided by the N. Y. Public Service Commission for the Second District, March 30, 1908.

An order of the N. Y. Public Service Commission establishing the capitalization of a new enterprise should be sufficiently flexible to allow of additional capitalization if properly required for the completion of the construction. *Application of Rochester, Corning, Elmira Traction Co.* Decided by the N. Y. Public Service Commission for the Second District, March 30, 1908.

§ 56. Forfeiture; penalties; * [officers and agents of carriers guilty of misdemeanors].—1. Every common carrier, railroad corporation and street railroad corporation and all officers, and agents of any common carrier, railroad corporation or street railroad corporation shall obey, observe and comply with every order made by the commission, under authority of this act, so long as the same shall be and remain in force. Any common carrier, railroad corporation or street railroad corporation which shall violate any provision of this act, or which fails, omits or neglects to obey, observe or comply with any order or any direction or requirement of the commission, shall forfeit to the people of the state of New York not to exceed the sum of five thousand dollars for each and every offense; every violation of any such order or direction or requirement, or of this act, shall be a separate and distinct offense, and, in case of a continuing violation, every day's continuance thereof shall be and be deemed to be a separate and distinct offense.

2. Every officer and agent of any such common carrier or corporation who shall violate, or who procures, aids or abets any violation by any such common carrier or corporation of, any provision of this act, or who shall fail to obey, observe and comply with any order of the commission or any provision of an order of the commission, or who procures, aids or abets any such common carrier or corporation in its failure to obey, observe and comply with any such order or provision, shall be guilty of a misdemeanor.

Provisions of Interstate Commerce Act relative to forfeitures by shippers,—see Elkin's Act, § 1, post, Appendix B.

Criminal liability of shippers and carriers under Interstate Commerce Act,—see Interst. Com. Act, § 10, Elkin's Act, § 1, post, Appendix B.

Actions by persons aggrieved for loss or damage caused by violation of provisions of this act,—see post, § 40.

Forfeitures and penalties for carrier's failure to file its annual report within the specified time,—see ante, § 46.

Penalties against other than common carriers,—see post, § 58.

Actions to enforce penalties and forfeitures,—see post, § 59.

Forfeitures for non-compliance with orders of Commission as to gas and electrical corporations,—see post, § 73.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

What statutes construed as penal,—see ante, § 1, note [35].

Construction of statutes containing penal provisions,—see ante, § 1, notes [36], [37].

*Words in brackets not a part of section heading as enacted.—Ed.

Who are common carriers,—see ante, § 2, notes [2]–[7].

Whether statutes imposing penalties for excessive charges are a regulation of interstate commerce,—see ante, § 25, note [14].

Criminal liability for discriminations in rates,—see ante, § 31, notes [89]–[94].

Criminal liability for violations of § 32,—see ante, § 32, note [35].

Indictments for failure to charge published rate,—see ante, § 33, note [10].

Prosecution for giving of free transportation,—see ante, § 33, note [17].

Liability for false billing or false weighing,—see ante, § 34, notes [8]–[10].

Criminal liability for violations of long and short haul section,—see ante, § 36, notes [42]–[45].

Indictment for discrimination by failure to furnish cars,—see post, § 37, note [24].

Civil liability of railroad for unlawful acts of its servants,—see ante, § 40, note [1].

A state regulative act which fixes a maximum charge to be made by railroads and imposes enormous penalties and the possibility of imprisonment for any violation thereof, held to be unconstitutional as preventing the railroads or its servants from testing in the courts the validity of such act.—*Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. R. (U. S.) 441.

A state statute provided that claims for loss or damage to property while in the possession of common carriers be adjusted and paid within forty days if the shipment be intrastate or within ninety days if interstate, and providing a penalty of \$50 for failure to so adjust.—*Held*, that the penalty was not unreasonable in a case where the amount sought to be recovered was \$1.75.—*Seaboard Air L. Co. v. Seegers*, 207 U. S. 73, 28 Sup. Ct. R. (U. S.) 28, affg. s. c. 73 S. C. 71, 52 S. E. 797.

A federal statute, imposing a liability to a penalty upon “any company, owner or custodian” of animals who should keep horses in cars more than 28 hours without unloading, does not refer to the receiver of a railroad, who is merely the court’s officer and appointed to execute its orders.—*U. S. v. Harris*, 177 U. S. 305, 20 Sup. Ct. R. (U. S.) 609, affg. s. c. 85 Fed. 533, 78 Fed. 290.

Section 14 of the act creating the Texas Railroad Commission provided penalties of not more than \$5,000 nor less than \$100 for each disobedience to the orders of the Commission as to rates. The constitutionality of the provision discussed but not passed upon.—*Reagan v. Farmers’ Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. R. (U. S.) 1047.

The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.—*Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. R. (U. S.) 110, affg. s. c. 82 Mo. 221.

Where an agent of a railroad is prosecuted under the Interstate Commerce Act, for an unlawful act, it is not necessary to allege or prove that the particular unlawful act complained of was done under authority conferred by his principal, or by its direction, but it is sufficient to show that the accused was in fact an agent of a railroad subject to the provisions of the act, and that the wrong was committed under color of his office or agency.—*U. S. v. Tozer*, 37 Fed. 635, 2 L. R. A. 444n.

Where an ordinance required a street railway to run its cars every 20 minutes between 12 M. and 6 A. M., the act of a company which owned lines on parallel avenues in running cars on only one of them in compliance with the statute, is not a sufficient compliance as to both lines.—*Mayor v. Dry Dock, E. B. & B. R. Co.*, 133 N. Y. 104, 30 N. E. 563.

A corporation may be held responsible for actual corporate conduct, even though it does not amount to formal corporate action.—*People v. North River Sugar Ref. Co.*, 121 N. Y. 582, 24 N. E. 584, 9 L. R. A. 33n.

The general railroad act of 1850, § 39, provided that locomotives should ring their bells or blow their whistles before crossing a highway and provided a penalty for every neglect of the provisions of the section.—*Held*, that the penalty was incurred every time a public highway was crossed by a locomotive without ringing the bell or blowing the whistle.—*People v. N. Y. C. R. Co.*, 13 N. Y. 78, affg. s. c. 25 Barb. 199.

A statute of Illinois which provides that if any railroad corporation shall charge more than a fair and reasonable rate it shall be deemed guilty of extortion, is not void for uncertainty, where by a further section there is provision for the making by a board of commissioners of a schedule of reasonable maximum rates for each of the railroads in the state, thus furnishing a uniform rule for the guidance of the railroads.—*Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141.

Penalties for violation of the charges and rates fixed by the Board of Railroad Commissioners of Iowa held not excessive.—*Burlington, C. R. & N. Co. v. Dey*, 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436n.

A statute of Kentucky which provides that if a railroad shall charge more than a "just and reasonable toll or compensation" for transportation, it shall be guilty of extortion, and fixes a penalty therefor, is void for uncertainty, as it fixes no standard by which rates may be considered

reasonable or unreasonable, and leaves the criminality of the carrier's act in each case to be determined from the jury's view of the reasonableness of the rate charged.—*Louisville & N. R. Co. v. Commonwealth*, 99 Ky. 132, 18 Ky. L. R. 42, 35 S. W. 129, 33 L. R. A. 209n.

The legislature may compel common carriers to discharge the duties and obligation they owe to the public, etc., by reasonable statutory regulations, and compel due observance of those by fines and penalties.—*McGowan v. Wilmington & W. R. Co.*, 95 N. C. 417.

§ 57. Summary proceedings * [to enforce orders of commissions].—Whenever either commission shall be of opinion that a common carrier, railroad corporation or street railroad corporation subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the state of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time, not exceeding twenty days after service of a copy of the petition, within which the common carrier, railroad corporation or street railroad corporation complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations as the court shall deem necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford the appropriate relief.

* Words in brackets not a part of section heading as enacted.—Ed.

Court proceedings to compel observance of interstate tariffs or to require discontinuance of discriminations in interstate traffic,—see Elkins Act, § 3, post, Appendix B.

Proceedings to enforce orders of Interstate Commerce Commission,—see Interst. Com. Act, §§ 12, 20, post, Appendix B.

Proceedings by former Board of Railroad Commissioners to enforce decisions,—see N. Y. R. R. L., § 162.

Duty of counsel to the Commission as to instituting proceedings,—see ante, § 12.

Duty of counsel to Commission to represent and appear for it in all proceedings under this Act,—see ante, § 12.

Proceedings instituted by Commission shall be preferred on court calendars,—see ante, § 21.

Limitation of grounds upon which courts may interfere with the enforcement of orders of the Commission,—see ante, § 23.

Procedure of Commission in making orders,—see ante, § 48.

Summary proceedings for enforcement of the orders of Commission as to gas and electrical corporations and municipalities,—see post, § 74.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Who are common carriers,—see ante, § 2, notes [2]–[7].

[1] Judicial Enforcement of Orders — In general.

The United States Supreme Court disapproves a method of procedure on the part of railroad companies as would lead them to withhold the larger part of their evidence from the Commission, and then first adduce it in the Circuit Court. The Commission is an administrative board, and the courts are only to be resorted to when the Commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the Commission have been disregarded.—*Cincinnati, N. O. & T. P. R. Co. v. Interst. Com. Commission*, 162 U. S. 184, 16 Sup. Ct. R. (U. S.) 700.

Under the amendment to Interst. Com. Act, § 12, requiring the Commission to enforce the provisions of the Act and making it the duty of any district attorney to whom the Commission might apply to institute and prosecute all necessary proceedings for the enforcement of the Act, a proceeding may be brought by a district attorney at the request of the Commission, to enjoin discriminatory action on the part of a railroad, without an investigation and order by the Commission.—*U. S. v. Mo. Pac. R. Co.*, 65 Fed. 903.

The Minnesota Act of 1887 provided that when the rates are fixed by the state commission, if the company do not comply within ten days, proceedings by mandamus can be instituted by the commission to compel the company to comply with provisions as to posting, etc., of the schedules; if the commission does not institute such proceedings, the company

may appeal to the district court of the state.—*Held*, that this is due process of law.—*Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. 849.

The act creating the N. Y. Board of Railroad Commissioners gave neither it nor the courts any power to enforce its determinations.—*People v. N. Y. L. E. & W. R. Co.*, 104 N. Y. 58, 9 N. E. 856, revg. s. c. 40 Hun (N. Y.), 570.

In acting upon decisions of the state railroad commission the function of the courts is purely judicial, not administrative.—*Morgan's L. & T. R. & Ss. Co. v. R. R. Commission*, 109 La. 247, 33 So. 214.

When the commission makes an order against a carrier but institutes no proceeding to enforce it, the carrier is not authorized to take an appeal from the findings of the commission to the district court.—*Railway Transfer Co. v. Railroad & Warehouse Commission*, 39 Minn. 231, 39 N. W. 150.

A statute authorizing the state railroad commission to apply to the courts for enforcement of its orders does not confer new jurisdiction on the courts, but authorizes resort to them within their established jurisdiction.—*Mississippi R. R. Commission v. Gulf & S. I. R. Co.*, 78 Miss. 750, 29 So. 789.

The North Carolina Railroad Commission is an administrative body, and its orders and decisions are merely the basis of judicial action to enforce them or furnish their violation.—*Pate v. Wilmington & W. R. Co.*, 122 N. C. 877, 29 S. E. 334.

[2] — Who may sue.

The Interstate Commerce Commission is a body corporate, with legal capacity to be a party plaintiff or defendant in the federal courts.—*Texas & P. R. Co. v. Inters. Com. Commission*, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666.

Proceedings by the state board of railroad commissioners to enforce its orders should be brought in the name of the state.—*Smith v. Ch. M. & St. P. R. Co.*, 86 Iowa, 202, 53 N. W. 128.

Where the state has empowered a city council to fix the maximum prices of gas, the council has fixed a maximum, and a federal court has enjoined the company from charging or the city from enforcing such rates, the state may nevertheless assert the validity of the limitation, and sue to enforce it.—*State ex rel. Atty.-Gen. v. Cincinnati Gas L. & C. Co.*, 18 Oh. St. 262.

[3] — Necessary defendants.

Ordinarily, when an action is brought to enforce an order requiring a railroad to desist from carrying traffic under certain joint rates, all parties to such a rate agreement should be made parties in the action.—

Interst. Com. Commission v. Tex. & P. R. Co., 57 Fed. 948, affg. s. c. 52 Fed. 187; revd. on other grounds, 162 U. S. 197, 16 Sup. Ct. R. (U. S.) 666.

[4] — Form of enforceable orders.

Where a carrier has violated the provisions of the Interstate Commerce Act in a particular manner, in reference to a single commodity, the court may perpetually enjoin it from further violations of that Act by the means employed and as to that commodity, but should not enjoin the carrier in general terms not to violate the Act in any particular.—*New York, N. H. & H. R. Co. v. Interst. Com. Commission*, 200 U. S. 361, 26 Sup. Ct. R. (U. S.) 272.

An order of the Interstate Commerce Commission which is a mere general statement of the duty of the carrier as defined by the law, is too indefinite to be the subject for a court decree to enforce it.—*Farmers' Loan & T. Co. v. No. Pac. R. Co.*, 83 Fed. 249.

When mandamus is brought to enforce an order of the railroad commissioners of Florida, such order should appear on its face to be within the power and authority of such commissioners to make.—*State v. Atlantic C. L. R. Co.*, 51 Fla. 578, 40 So. 875.

Where the alternative writ charges a general and complete violation of the commission's orders as to rates, etc., specific violations need not be alleged.—*State v. Atlantic C. L. R. Co.*, 48 Fla. 114, 37 So. 652.

[5] — Preliminary injunctions.

Interst. Com. Act, § 16, providing that in proceedings to enforce an order of the commission an appeal shall not operate to stay or supersede the order of the court appealed from, is merely declaratory of the general equity practice as it existed at the time the Interstate Commerce Act was passed, and will not be construed as excluding interstate commerce cases from the operation of Equity Rule 93, and so as affecting the right of the court, under that rule, to grant a stay pending appeal, in its discretion.—*Interst. Com. Commission v. So. Pac. R. Co.*, 137 Fed. 606; revd. on other grounds, 200 U. S. 536.

In a proceeding to enforce an order by the Interstate Commerce Commission forbidding the charging of an excessive rate, an order giving the railroad the right to charge the present rates pending the proceeding, but requiring an account to be kept with every shipper, and the payment into court of the excess, the same to be disposed of after the hearing, is in effect the granting of a rule *nisi*, which should not be granted unless there is a strong showing of right in favor of the complainant which would authorize the granting of a preliminary injunction, and, on the other hand, sufficient showing of probable injury to the defendants to authorize an alternative order.—*Interst. Com. Commission v. C. N. O. & T. P. R. Co.*, 64 Fed. 981.

Where the Interstate Commerce Commission has made an order that a railroad cease charging certain rates, held to be unjust and unreasonable, a preliminary injunction will not be granted, compelling the railroad to obey the order of the Commission, where the answer denies that the rates are unjust and unreasonable.—*Shinkle Co. v. L. & N. R. Co.*, 62 Fed. 690.

Where, in a proceeding to enforce an order of the Interstate Commerce Commission, the answer of the defendant denies the averments of the petition and alleges that the findings of fact by the Commission were erroneous, a preliminary injunction will not be granted to restrain the violation of the order.—*Interst. Com. Commission v. Lehigh V. R. Co.*, 49 Fed. 177.

[6] — What evidence may be considered.

A report of a railroad commission to the governor may undoubtedly be used against it in an application made at its instance to secure compliance with one of its orders.—*Seaboard Air L. R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, affg. s. c. 48 Fla. 129, 37 So. 314, 48 Fla. 150, 37 So. 658.

Mere arguments, opinions, etc., of the Interstate Commerce Commission are inadmissible in evidence, under Interst. Com. Act, § 16, in subsequent proceedings to enforce the order. The findings of fact should be so arranged in the report that they could be offered in evidence unaccompanied by extraneous embarrassing or incompetent matter calculated to comprise or mislead.—*Western, N. Y. & P. R. Co. v. Pa. Ref. Co.*, 137 Fed. 343.

In a proceeding to enforce an order of the Interstate Commerce Commission, the findings of fact in the report of the commission must control the action of the court in the absence of a satisfactory reply by the respondents.—*Interst. Com. Commission v. L. & N. R. Co.*, 118 Fed. 613.

In a proceeding to enforce an order of the Interstate Commerce Commission, it is not necessary that a transcript of the evidence taken by the Commission be filed in court, but the evidence so taken may be introduced and used in the proceeding in so far as it is relevant and competent.—*Interst. Com. Commission v. C. N. O. & T. P. R. Co.*, 64 Fed. 981.

A suit by the Interstate Commerce Commission in the Circuit Court to enforce its order is an original proceeding, in which the court is not confined to a re-examination of the case as heard and reported to the commission, but examines the case *de novo* and may hear such further testimony as it desires.—*Interst. Com. Commission v. C. N. O. & T. P. R. Co.*, 56 Fed. 925.

In a proceeding under Interst. Com. Act, § 16, to enforce an order of the Interstate Commerce Commission, the court is not restricted to the

mere ministerial duty of enforcing an order of the Commission, but the suit is an original and independent proceeding in which the court hears and determines the case *de novo* and in enforcing the orders, the court does not exercise a non-judicial power.—*Kentucky & I. Bridge Co. v. L. & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289.

In an action to enforce an order of the Board of Railroad Commissioners of Iowa, the case in the district court must be heard upon the record as made before the commissioners; that is, matters existing outside the record as made before the commissioners cannot be pleaded in the district court for the purpose of showing that the complaint made before the Board was in fact well grounded.—*State v. Ch. M. & St. P. R. Co.*, 86 Iowa, 641, 53 N. W. 323.

The claim of the Minnesota commission that its order is conclusive unless appealed from is without merit. The defendant may await the proceeding by the commission to enforce its order, and on such proceeding, there should be just such a trial as there would have been had the order been appealed from, and the court will examine matters of fact to ascertain whether there is any evidence reasonably tending to support the disputed findings of fact, taking evidence *de novo*.—*State v. Minneapolis & St. L. R. Co.*, 80 Minn. 191, 83 N. W. 60; *affd.* 186 U. S. 257, 22 Sup. Ct. R. (U. S.) 900; *Steenerson v. Gt. Northern R. Co.*, 69 Minn. 353, 72 N. W. 713.

[7] — Burden of proof.

Where the Interstate Commerce Commission has found that a certain reclassification of laundry soap shipped in less than carload lots was unreasonable and unjust, and sues to restrain the carrying out of such classification, the burden is on the defendant railroad to show that the facts on which the Commission based its action were not well founded.—*Interstate Com. Commission v. C. H. & D. R. Co.*, 146 Fed. 559; *affd.* 206 U. S. 142, 27 Sup. Ct. R. (U. S.) 648.

On application to a court by a state Commission, for mandamus to enforce rates, etc., the burden is on the resisting carrier to show the rates to violate a constitutional right.—*State v. Seaboard Air L. R. Co.*, 48 Fla. 150, 37 So. 658.

[8] — Referring of intricate questions.

In determining the reasonableness of a rate, the best practice is to send the testimony to a master to make all needful computations and comparisons between gross receipts, operating expenses, volume of traffic and net earnings, whereby the probable effect of a reduction in rates may be calculated.—*Chicago, M. & S. P. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. R. (U. S.) 336, *revg. s. c.* 90 Fed. 363.

[9] — Power to revise or modify.

The Interstate Commerce Commission was not given power to fix rates, either maximum, minimum, or absolute. Hence the courts will not confer that power indirectly by granting peremptory orders that carriers must in the future charge the rates found to be just and reasonable by the Commission at the time of its inquiry. Whether a given rate is unduly preferential and discriminative, is a question of fact, which the circuit court has jurisdiction to review, giving the findings of the Commission *prima facie* force as to the facts and conclusions therein set forth.—*Interst. Com. Commission v. Ala. Mid. R. Co.*, 168 U. S. 144, 18 Sup. Ct. R. (U. S.) 45, affg. s. c. 74 Fed. 715, 69 Fed. 227.

In a proceeding in the U. S. Circuit Court under Interst. Com. Act, § 16, to enforce an order of the Interstate Commerce Commission, the court has no power to revise, amend, divide, or modify such order, but must enforce, or refuse to enforce, the same in its entirety.—*Interst. Com. Commission v. L. S. & M. S. R. Co.*, 134 Fed. 942; affd. 202 U. S. 613, 26 Sup. Ct. R. (U. S.) 766.

The courts should inquire whether rates fixed by a state commission are just and unreasonable; but they may not revise or change a body of rates, which is an administrative or legislative, rather than a judicial function.—*Trammel v. Dinsmore*, 102 Fed. 794, revg. s. c. 92 Fed. 714.

It has been suggested that traffic managers are much better able by reason of their knowledge and experience to fix rates and decide what discriminations are justified by the circumstances, than courts. This cannot be conceded so far as it relates to the Interstate Commerce Commission, which by reason of the experience of its members in this kind of controversy and their great opportunity for full information, is in a sense an expert tribunal, but it is true of the federal courts. Nevertheless, courts are continually called upon to review the work of experts in all branches of business and science, and the intention of Congress that they should revise the work of railway traffic managers, whether railway managers or traffic commissioners, is too clear to admit of dispute.—*East Tenn. V. & G. R. Co. v. Interst. Com. Commission*, 99 Fed. 52, affg. s. c. 85 Fed. 107, revg. on other points, 181 U. S. 1, 21 Sup. Ct. R. (U. S.) 516.

In a proceeding in the Circuit Court, instituted by the merchants and shippers of Spokane, under Interst. Com. Act, § 16, to enforce a decision and order of the Commission, the court has no power to adjust differences between the litigants or to correct abuses complained of as to the policies of the railroad. The court can only pass upon the lawfulness of the order made by the Commission, and if that is found invalid, no relief can be granted to the complainants in that proceeding.—*Farmers' Loan & T. Co. v. No. Pac. R. Co.*, 83 Fed. 249.

The powers conferred on the courts to compel compliance with a "lawful order" of the Interstate Commerce Commission being purely statutory, they are strictly limited to the auxiliary jurisdiction thereby created, and the courts can only grant or refuse the Commission's application for enforcement of its order. They have no power to modify or change it.—*Detroit, G. H. & M. R. Co. v. Interst. Com. Commission*, 74 Fed. 803, revg. s. c. 57 Fed. 1005; affd. 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986.

On an application of the Interstate Commerce Commission to the U. S. Circuit Court for the enforcement of an order, the jurisdiction and power of the Court is only to approve or disapprove the order and to enforce or refuse to enforce the same. It has no power to modify it. The Court may go fully into the proof taken before the Commission, and may hear any additional proof offered by the Commission or the carrier. An order made by the Commission is inherently an administrative decree or mandate, and is not final or conclusive in the sense of a Court judgment or decree, even when the Circuit Court has approved it and ordered its enforcement.—*Interst. Com. Commission v. L. & N. R. Co.*, 73 Fed. 409.

In an action under Interst. Com. Act, § 16, to enforce an order of the commission, the court has no revisory power over the order.—*Interstate Commerce Commission v. D. L. & W. R. Co.*, No. 1, 64 Fed. 723.

In an action under Interst. Com. Act, § 16, to enforce an order of the commission, the complainant is not entitled to a rehearing upon a certificate of the commission stating that it did not intend to make the order as broad as its terms import, as the court can not substitute, for an order actually made, one such as the commission intended but failed to make.—*Interst. Com. Commission v. D. L. & W. R. Co.*, No. 1, 64 Fed. 723.

When an order of a commission cannot be enforced in its entirety it cannot be enforced at all by mandamus.—*State v. Atlantic C. R. Co.*, 51 Fla. 578, 40 So. 875.

The courts will not undertake the making or revision of freight or passenger tariffs.—*Pensacola & A. R. Co. v. State*, 25 Fla. 310, 5 So. 833, 3 L. R. A. 661n.

[10] — Questions which will be considered.

The Minnesota legislature established a Railroad and Warehouse Commission, and the supreme court of the state interpreted the act as providing that the rates fixed by the commission should be final and conclusive as to what are equal and reasonable charges, and that the court cannot inquire into the reasonableness of such rates. The railroad company, when the Commission asked for mandamus to enforce its decision, was denied permission to put in testimony as to the reasonableness of the

rates.—*Held*, that since this court is bound by the construction put upon the act by the state court, the act is in conflict with the U. S. Constitution, as depriving the carrier of its property without due process of law and denying it the equal protection of the laws.—*Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. R. (U. S.) 462, 702, revg. s. c. 38 Minn. 281, 37 N. W. 782.

When called upon to enforce an order of the Interstate Commerce Commission, the court is not restricted to the reasons assigned by the Commission for its conclusions, but may act upon other grounds or reasons.—*Interst. Com. Commission v. So. Pac. Co.*, 132 Fed. 829.

In a suit to enforce its orders, the Interstate Commerce Commission represents the public, and its right to relief is not affected by the fact that the complainants before it may themselves have participated in unlawful practices.—*Interst. Com. Commission v. So. Pac. Co.*, 132 Fed. 829.

The Interstate Commerce Commission applied to the Circuit Court for an order, under Interst. Com. Act, § 16, to enforce a decision of the Commission pursuant to the long and short haul section of the Act. The Commission had declined to hear evidence offered by the carrier, as to competition tending to create dissimilarity of "circumstances and conditions," giving as reasons for such refusal the unsound one that competition was immaterial if it was between carriers subject to the Act.—*Held*, that the defendant was entitled to have its defense considered in the first instance, at least, by the Commission, upon a full consideration of all the circumstances and conditions on which "a lawful order" could be found. The proper course for this court, upon such refusal, was to dismiss the petition filed by the Commission for the enforcement of its order, and remand the case to the Commission without prejudice to the right of any party in interest to apply to that tribunal to proceed to hear and determine the matters in controversy according to law.—*Interst. Com. Commission v. S. R. Co.*, 105 Fed. 703.

That a railroad commission has made an order and instituted the proceeding, simply or primarily to have its powers defined and if possible to get the courts to reverse their former ruling in a similar case, is no reason why the courts should refuse to entertain the proceeding. It is enough if there is a real vital controversy, no matter what motive or influence induced it.—*Wilmington & W. R. Co. v. Board of R. R. Comrs.*, 90 Fed. 33.

Where the Interstate Commerce Commission has, in an order, assumed to exercise a power it has not been vested with, and a proceeding is brought to enforce such order, it is the duty of the court to declare the same null and void.—*Farmers' Loan & T. Co. v. No. Pac. R. Co.*, 83 Fed. 249.

An order regulating accessorial services by the carrier is not a "lawful order" which the courts are required to enforce at the request of the Interstate Commerce Commission, if it will operate to deprive the carrier of his business at the particular place in question.—*Detroit, G. H. & M. R. Co. v. Interst. Com. Commission*, 74 Fed. 803, revg. s. c. 57 Fed. 1005; affd. 167 U. S. 633, 17 Sup. Ct. R. (U. S.) 986.

An order made by the Interstate Commerce Commission will not be judicially enforced, if it rests upon an erroneous principle and is unreliable.—*Interst. Com. Commission v. Lehigh V. R. Co.*, 74 Fed. 784.

The duty imposed on railroad companies by the laws of Iowa, and the Interstate Commerce Commission Act, of receiving freight and passengers from connecting roads is one which the federal courts will enforce by mandatory injunction, where the injury from non-performance is continuing, and it is no defense that there is a strike on plaintiff's road and that to receive such freight, etc., would cause a strike on defendant's road as well.—*Chicago, B. & Q. R. Co. v. Burl. C. R. & N. R. Co.*, 34 Fed. 481.

Where the Interstate Commerce Commission has made an order directing a certain railroad to make changes in the classification of certain commodities, it is no objection to the enforcement of such order that the former classification is in use by other railroads, not parties to the proceeding, and the changes ordered will tend to break up the harmony in classification and rating existing between these roads by virtue of their acceptance and use of the official classification, as made by the representatives of such roads.—*Page v. D. L. & W. R. Co.*, 6 Inters. Com. R. 548.

The court will issue mandamus to compel a carrier to perform clearly defined duties, even though such duties be continuing, and requiring a degree of supervision over the details of the management of the road.—*State v. Tex. & P. R. Co.*, 52 La. Ann. 1850, 28 So. 284.

Before equity will grant enforcement of the statutes against discriminations, etc., it must be fully satisfied that its orders will not likewise operate as discrimination.—*Choteau v. Union R. Co.*, 22 Mo. App. 286.

[11] — Awards of money damages.

In an action by the Interstate Commerce Commission under Interst. Com. Act, § 16, to enforce an order directing certain railroads to desist from certain acts of unlawful discrimination and further directing such railroads to make reparation of damages to the persons injured by the discrimination, the court, sitting in equity, has no jurisdiction to enforce that part of the order requiring payment of damages, and a suit at law must be resorted to therefor.—*Interst. Com. Commission v. W. N. Y. & P. R. Co.*, 82 Fed. 192.

[12] — Rule for doubtful cases.

Since an order of the Interstate Commerce Commission is not binding until it has passed the scrutiny of the courts, and since there is no appeal or review of a decision adverse to the complainant, the Interstate Commerce Commission will make an order favorable to the latter, in a doubtful case.—*Miner v. N. Y. N. H. & H. R. Co.*, 11 Inters. Com. R. 422.

[13] Mandamus as a legal remedy—In general.

Mandamus will lie to compel a carrier to operate its road as a continuous line.—*Union Pac. R. Co. v. Hall*, 91 U. S. 343, affg. s. c. Fed. Cases, 5,950.

Mandamus lies to compel furnishing of "equal facilities."—*Augusta S. R. Co. v. Wrightsville & T. R. Co.*, 74 Fed. 522.

Mandamus lies against a railroad only to enforce a duty clearly and specifically imposed.—*People v. N. Y. L. E. & W. R. Co.*, 104 N. Y. 58, 9 N. E. 856, revg. s. c. 40 Hun (N. Y.), 570.

Mandamus will not lie where the remedy at law is clear and complete.—*People ex rel. Perkins v. Hawkins*, 46 N. Y. 9.

Mandamus will lie to compel a railroad corporation to operate its line.—*People v. Albany & Vt. R. Co.*, 24 N. Y. 261, affg. 37 Barb. (N. Y.) 216, 11 Abb. Pr. (N. Y.) 136, 19 How. Pr. (N. Y.) 523; *State v. Spokane St. R. Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515.

Although as a general rule, mandamus will not lie where the party has another remedy, it is not universally true in relation to corporations and ministerial officers. Notwithstanding they may be liable in an action on the case, they may be compelled by mandamus to exercise their functions according to law.—*McCullough v. Mayor of Brooklyn*, 23 Wend. (N. Y.) 458.

To warrant the issuance of a peremptory writ of mandamus, the legal rights of the applicant must be clear, with no material facts in dispute between the parties.—*Matter of McGrath*, 56 Hun (N. Y.), 76.

The duty and function of a railroad common carrier is a public trust, which having been conferred by the state and accepted by the corporation, may be enforced for the public benefit.—*People v. N. Y. C. & H. R. R. Co.*, 28 Hun (N. Y.), 543.

The fact that injured individuals may have private remedies for the damages they have sustained by neglect of duties by a railroad, does not preclude the state from its remedy by mandamus.—*People v. N. Y. C. & H. R. R. Co.*, 28 Hun (N. Y.), 543.

Mandamus will issue to compel a railroad to receive and transport freight.—*People v. N. Y. C. & H. R. R. Co.*, 28 Hun (N. Y.), 543.

Mandamus will lie to compel a carrier to resume or continue performance of its public functions as such.—*People v. N. Y. C. & H. R. R. Co.*, 28 Hun (N. Y.), 543; *Cumberland T. & T. Co. v. Morgan's L. & T. R. Co.*, 51 La. Ann. 29, 24 So. 803; *Godell v. Woodbury*, 71 N. H. 378, 52 Atl. 855; *Haugen v. Albina L. & W. Co.*, 21 Ore. 411, 28 Pac. 244, 14 L. R. A. 424.

Mandamus is not the proper remedy when a carrier wrongfully refuses to transport the goods of a shipper, unless the carrier suspends the exercise of its franchises, but the shipper will be left to his action at law for damages which is an adequate remedy.—*People ex rel. Ohlen v. N. Y. L. E. & W. R. Co.*, 22 Hun (N. Y.), 533.

Mandamus will not lie to compel a carrier to furnish facilities, or to charge only a reasonable rate. Its refusal so to do is a private injury capable of being fully compensated by an action for damages. Mandamus will not lie where there is a plainly adequate remedy by an action at law.—*People ex rel. Ohlen v. N. Y. L. E. & W. R. Co.*, 22 Hun (N. Y.), 533.

Mandamus will not lie to enforce a statute which requires stoppage of all trains at a county seat, where the town in question already has an adequate train service, local and through, and the train complained of is a New York and St. Louis special.—*Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. R. (U. S.) 722, revg. s. c. 175 Ill. 359, 51 N. E. 842.

Mandamus may be granted to enforce the performance of a duty to the public imposed by law upon a common carrier corporation, whether such duty be prescribed by statute or charter in express terms or is raised by implication of law from the nature of the public duty authorized by law to be performed and which is being performed by such corporation.—*State v. Atlantic C. L. R. Co.* — Fla. —, 44 So. 213.

A common carrier's duty to the public is to obey the reasonable regulations of the Railroad Commission (Ga.), and if the corporation fails to perform such duty, it may be compelled by mandamus to do so, at the instance of a shipper affected by the unlawful acts.—*Southern R. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429.

Individuals may, by mandamus, enforce the performance by a corporation of its public duty as to matters in which they have a special interest.—*Savannah & O. C. Co. v. Shuman*, 91 Ga. 400, 17 S. E. 937.

The running of passenger trains or cars separate from freight trains may be enforced by mandamus.—*People v. St. L. A. & T. H. R. Co.*, 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656.

Mandamus is the proper remedy by which to compel a railroad to erect and maintain a station in a town.—*People v. Ch. & A. R. Co.*, 130 Ill. 175, 22 N. E. 857.

A railroad may be compelled by mandamus to relay a portion of its track torn up in violation of its charter.—*State ex rel. Little v. Dodge City, M. & T. R. Co.*, 53 Kan. 329, 36 Pac. 755, 24 L. R. A. 564n.

Mandamus will lie to compel a street car company to perform a continuing duty under a city ordinance.—*City of Potwin Place v. Topeka St. R. Co.*, 51 Kan. 609, 33 Pac. 309.

The duty of a carrier to render services for all without discrimination may be enforced by mandamus.—*State ex rel. Cumberland Telephone and Telegraph Co. v. Tex. & P. R. Co.*, 52 La. Ann. 1850, 28 So. 284.

Mandamus will lie to compel a carrier to issue a commutation ticket to a person wrongfully refused the same.—*State ex rel. Atwater v. D. L. & W. R. Co.*, 48 N. J. L. 55, 2 Atl. 803.

Duties of corporations arising out of contractual relations will not be enforced by mandamus.—*Commonwealth ex rel. Stern v. Wilkesbarre Gas. Co.*, 2 Kulp (Pa.), 499.

[14] — Enforcing orders of commission.

Remedies afforded by statute for abuses in transportation conditions are cumulative and in addition to those existing at common law.—*Atchison T. & S. R. Co. v. D. & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. R. (U. S.) 185, revg. s. c. 13 Fed. 546.

Mandamus will lie to enforce an order of the N. Y. Board of Railroad commissioners, requiring a railroad to furnish proper accommodations for freight at a given station. The court to which the application is made may review such order as to its reasonableness.—*People v. D. & H. C. Co.*, 32 App. Div. (N. Y.) 120, 52 N. Y. Supp. 850; affd. 165 N. Y. 362, 59 N. E. 138.

The duty of a railroad to comply with orders of the railroad commissioners of Florida will be enforced by mandamus.—*State v. Atlantic C. L. R. Co.*, 51 Fla. 578, 40 So. 875; *Southern R. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429.

Mandamus is an appropriate remedy to compel observance of a valid regulation made by state railroad commissioners.—*State v. Atlantic C. L. R. Co.*, 48 Fla. 114, 37 So. 652.

[15] Effect of receivership.

Where a Court which has designated receivers to operate a railroad is asked to enforce against such railroad an order made by the Interstate Commerce Commission before such designation, it must apply the same rules and principles as if the railroad were being operated by the officers and agents of the corporation itself. It can not proceed as though

it were merely asked to regulate the conduct of its receivers; the latter have the same right to question the validity of the order as would the railroad company itself.—*Farmers' Loan & T. Co. v. No. Pac. R. Co.*, 83 Fed. 249.

Whether an order of the Interstate Commerce Commission should be made and enforced against a railroad in the hands of a receiver, is a question to be presented to and disposed of by the courts on the proceedings therein for the enforcement of such an order.—*Loud v. South Car. R. Co.*, 4 Inters. Com. R. 205, 5 I. C. C. R. 529.

A receivership subsequent to complaint should not interfere with the progress of a proceeding brought merely for the purpose of railway regulation.—*Railroad Commission of Ga. v. Clyde Ss. Co.*, 4 Inters. Com. R. 120, 5 I. C. C. R. 324.

A judgment against a railroad company directing it to construct a farm crossing may be enforced against its receiver unless he surrender up possession of the road.—*Peckham v. D. C. R. Co.*, 145 N. Y. 385, 40 N. E. 15.

An action under a state statute requiring a railroad to fence with its right of way, etc., will lie even though the railroad is in the hands of a federal receiver.—*Ohio & M. R. Co. v. Russell*, 115 Ill. 52, 3 N. E. 561.

A receiver will not be compelled by mandamus to operate a portion of a railroad which he has discontinued under the instructions of the court which appointed him.—*State ex rel. Commissioners v. Marietta & Cincinnati R. Co.*, 35 Oh. St. 154.

§ 58. Penalties for other than common carriers; * [liability of agents].— 1. Any corporation, other than a common carrier, railroad corporation or street railroad corporation, which shall violate any provision of this act, or shall fail to obey, observe and comply with every order made by the commission under authority of this act, so long as the same shall be and remain in force, shall forfeit to the people of the state of New York a sum not exceeding one thousand dollars for each and every offense; every such violation shall be a separate and distinct offense, and the penalty or forfeiture thereof shall be recovered in an action as provided in section fifty-nine of this act.

2. Every person who, either individually or acting as an officer or agent of a corporation other than a common carrier, railroad corporation or street railroad corporation, shall violate any provision of this act or fail to obey, observe or comply with any order

* Words in brackets are not a part of section heading as enacted.—ED.

made by the commission under this act, so long as the same shall be or remain in force, or who shall procure, aid or abet any such corporation in its violation of this act or in its failure to obey, observe or comply with any such order, shall be guilty of a misdemeanor.

3. In construing and enforcing the provision of this act relating to forfeitures and penalties the act of any director, officer or other person acting for or employed by any common carrier, railroad corporation, street railroad corporation or corporation, acting within the scope of his official duties or employment, shall be in every case and be deemed to be the act of such common carrier, railroad corporation, street railroad corporation or corporation.

Forfeitures by shippers for violation of acts regulating interstate commerce,—see Elkin's Act, § 1, post, Appendix B.

Criminal liability of shippers under Interstate Commerce Act,—see Interst. Com. Act, § 10, post, Appendix B.

Forfeitures and penalties for violations of this Act by common carriers,—see ante, § 56.

General rules of statutory construction,—see ante, § 1, notes [23]-[40].

What statutes construed as penal,—see ante, § 1, note [35].

Construction of statutes containing penal provisions,—see ante, § 1, notes [36]-[37].

Corporations included in term "persons,"—see ante, § 2, note [11].

Whether statutes imposing penalties for excessive charges are a regulation of interstate commerce,—see ante, § 25, note [14].

Criminal liability for discriminations in rates,—see ante, § 31, notes [89]-[94].

Criminal liability for violations of § 32,—see ante, § 32, note [35].

Indictments for failure to charge published rate,—see ante, § 33, note [10].

Criminal liability for violations of the long and short haul rule,—see ante, § 36, notes [42]-[45].

Indictment for failure to furnish cars without discrimination,—see ante, § 37, note [24].

Under the Elkins Act of Feb. 19, 1903, ch. 708 (32 Stat. 847; U. S. Comp. Stat. Supp. 1905, p. 599), each shipment at less than the lawful rate is a separate offense, and where the published rate is on carload lots, each car is a separate shipment.—*U. S. v. Standard Oil Co.*, 155 Fed. 305.

§ 59. Action to recover penalties or forfeitures.—

An action to recover a penalty or a forfeiture under this act may be brought in any court of competent jurisdiction in this state in the name of the people of the state of New York, and shall be commenced and prosecuted to final judgment by counsel to the commission. In any such action all penalties and forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be, or be held to be, a waiver of the right to recover any other penalty or forfeiture; if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for violation of an order of the commission the defendant was actually and in good faith prosecuting a suit, action or proceeding in the courts to set aside such order, the court shall remit the penalties or forfeitures incurred during the pendency of such suit, action or proceeding. All moneys recovered in any such action, together with the costs thereof, shall be paid into the state treasury to the credit of the general fund.

Similar provisions of Interstate Commerce Act,—see Interst. Com. Act, § 16, Elkin's Act, § 1, post, Appendix B.

Investigations by Commission to determine whether carriers are complying with the provisions of this Act and with orders of the Commission,—see ante, post, § 45, subd. 2.

Actions to recover penalties or forfeitures against gas and electrical corporations,—see post, § 73.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

What statutes construed as penal,—see ante, § 1, note [35].

Construction of statutes containing penal provisions,—see ante, § 1, notes [36]–[37].

Recovery of penalties by the aggrieved party,—see ante, § 26, notes [68]–[73].

Criminal prosecutions for discriminations as to rates,—see ante, § 31, notes [89]–[94].

Criminal liability for violations of § 32,—see ante, § 32, note [35].

Indictments for failure to charge the published rate,—see ante, § 33, note [10].

Criminal prosecutions for violation of the long and short haul rule,—see ante, § 36, notes [42]–[45].

Indictment for failure to furnish cars without discrimination,—see ante, § 37, note [24].

Suits by individuals to enforce penalties for failure to file reports,—see ante, § 46, note.

The "amount in controversy," which determines whether a suit to enforce an order of a state commission or for penalties can be removed to a federal court, is the total amount of the penalties which might be collected under such order or suit.—*McNeill v. So. R. Co.*, 202 U. S. 543, 26 Sup. Ct. R. (U. S.) 722.

The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.—*Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. R. (U. S.) 110, affg. s. c. 82 Mo. 221.

A carrier who has since conformed with a ruling of the Interstate Commerce Commission should not be prosecuted for violations of the Interstate Commerce Act in that respect before such ruling was made, and pursuant to a construction of the Act, then approved by the carrier's counsel.—*Slater v. No. Pac. R. Co.*, 2 Inters. Com. R. 32, 243, 2 I. C. C. R. 359.

Where there is a reasonable doubt as to the construction of a statute prescribing a penalty for its violation, the party of whom the penalty is claimed is entitled to the benefit of it.—*Goodspeed v. Ithaca St. R. Co.*, 184 N. Y. 351, 77 N. E. 392, affg. s. c. 88 App. Div. (N. Y.) 147, 84 N. Y. Supp. 383.

That other companies are violating a municipal ordinance as to speed of trains and are not prosecuted, is no defense to an action for a penalty against one railroad charged with violating such ordinance.—*City of Buffalo v. N. Y. L. E. & W. R. Co.*, 152 N. Y. 276, 46 N. E. 496, affg. s. c. 6 Misc. (N. Y.) 630, 27 N. Y. Supp. 297.

More than one penalty may be recovered in a suit brought in behalf of the public.—*Deyo v. Rood*, 3 Hill (N. Y.), 527.

In prosecutions to recover for a violation of a statute of Iowa providing that railroads shall charge reasonable rates, the state is precluded from denying that rates fixed by the railroad commission are reasonable.—*Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436n.

A private relator cannot use the name of the state in an action to enforce the statutory penalties against a railroad for failing to file a report, as required by law.—*State ex rel. Hodge v. Marietta & N. G. R. Co.*, 108 N. C. 24, 12 S. E. 1041.

It is not improper to join several counts for distinct penalties, the total being the sum in controversy for the purpose of determining the jurisdiction of a court over the case.—*Gibson v. Gault*, 33 Pa. 44.

Under a statute regulating the speed of trains within the limits of a city and providing for the recovery of a penalty for each and every violation of the said act, cumulative penalties may be recovered.—*State v. Wisconsin Cent. R. Co.*, 113 N. W. (Wis.) 952.

§ 60. Duties of commissions as to interstate traffic; * [commissions as complainants before interstate commerce commission].— Either commission may investigate freight rates on interstate traffic on railroads within the state, and when such rates are, in the opinion of either commission, excessive or discriminatory or are levied or laid in violation of the interstate commerce law, or in conflict with the rulings, orders or regulations of the interstate commerce commission, the commission may apply by petition to the interstate commerce commission for relief or may present to the interstate commerce commission all facts coming to its knowledge, as to violations of the rulings, orders, or regulations of that commission or as to violations of the interstate commerce law.

Power of Interstate Commerce Commission to conduct investigations upon complaint of state railroad commissions or commissioners,— see Interst. Com. Act, § 13, post, Appendix B.

Power of Commission to investigate of its own initiative,— see ante, § 48, subd. 1.

General rules of statutory construction,— see ante, § 1, notes [23]–[40].

Effect of vacancies on power of commission,— see ante, § 4, note [5].

When Interstate Commerce Commission will leave adjustment of rates to state commissions,— see also ante, § 25, note [20].

When a state commission has power directly or indirectly to remedy a situation which mainly concerns that state, the Interstate Commerce Commission will leave the matter to the action of the state authorities, even though an interstate rate is involved.—*Dallas Freight Bureau v. Tex. & P. R. Co.*, 8 Inters. Com. R. 33.

Rates for interstate passenger traffic will not necessarily be reduced to the sum of the state rates now in force by operation of state law.—*Savannah Bureau v. Charleston & S. R. Co.*, 7 Inters. Com. R. 601.

A state railroad commission is a proper complainant before the Interstate Commerce Commission as to any matter of interstate charges into

*Words in brackets not a part of section heading as enacted.—Ed.

its state which it has investigated and found unreasonable.—*Railroad Commission of Ga. v. Clyde Ss. Co.*, 4 Inters. Com. R. 120, 5 I. C. C. R. 324.

The state commission may act as complainant before the Interstate Commerce Commission, and in such capacity is an instrument for the transmission of the complaint to the federal commission.—*Railroad Commission of Florida v. Savannah, F. & W. R. Co.*, 3 Inters. Com. R. 414, 688, 5 I. C. C. R. 13.

ARTICLE IV.

Provisions Relating to Gas and Electric Corporations; Regulation of Price of Gas and Electricity.

SECTION 65. Application of article.

66. General powers of commissions in respect to gas and electricity.
67. Inspection of gas and electric meters.
68. Approval of incorporation and franchises; certificate.
69. Approval of issue of stock, bonds and other forms of indebtedness.
70. Approval of transfer of franchise.
71. Complaints as to quality and price of gas and electricity; investigation by commission; forms of complaints.
72. Notice and hearing; order fixing price of gas or electricity, or requiring improvements.
73. Forfeiture for noncompliance with order.
74. Summary proceedings.
75. Defense in case of excessive charge for gas* and electricity.
76. Jurisdiction.
77. Powers of local officers.

§ 65. Application of article.—This article shall apply to the manufacture and furnishing of gas for light, heat or power and the furnishing of natural gas for light, heat or power, and the generation, furnishing and transmission of electricity for light, heat or power.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

The words “any gas company” in an ordinance relating to charges, includes companies furnishing natural gas as well as those furnishing manufactured gas.—*Cline v. Springfield*, 10 Oh. Dec. 389.

* Headnote of section as enacted (*post*, § 75) has the word “or” instead of the word “and.”

§ 66. General powers of commissions in respect to gas and electricity.— Each commission shall within its jurisdiction:

1. **[As to wires, conduits, etc.]*** Have the general supervision of all persons and corporations having authority under any general or special law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of furnishing or distributing gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors.

2. **[As to methods of manufacture and supply.]*** Investigate and ascertain, from time to time, the quality of gas supplied by persons, corporations and municipalities; examine the methods employed by such persons, corporations and municipalities in manufacturing and supplying gas or electricity for light, heat or power and in transmitting the same, and have power to order such improvements as will best promote the public interest, preserve the public health and protect those using such gas or electricity and those employed in the manufacture and distribution thereof, or in the maintenance and operation of the works, wires, poles, lines, conduits, ducts and systems maintained in connection therewith.

3. **[As to standards of purity and efficiency.]*** Have power to fix the standard of illuminating power and purity of gas, not less than that prescribed by law, to be manufactured or sold by persons, corporations or municipalities for lighting, heating or power purposes, and to prescribe methods of regulation of the electric supply system as to the use for incandescent lighting and fix the initial efficiency of incandescent lamps furnished by the persons, corporations or municipalities generating and selling electric current for lighting, and by order to require the gas so manufactured or sold to equal the standard so fixed by it, and to establish the regulations as to pressure at which gas shall be delivered. For the purpose of determining whether the gas sold by such persons, corporations or municipalities for lighting, heating or power purposes conforms to the standard of illuminating power and purity and, of its own motion, examine and investigate the methods employed in manufacturing, delivering and supplying the gas so sold, and shall have access through its members or persons employed and authorized by

* Matter in brackets not a part of the section as enacted.

it to make such examinations and investigations to all parts of the manufacturing plants owned, used or operated for the manufacture or distribution of gas by any such person, corporation or municipality. Any employee or agent of the commission who divulges any fact or information which may come to his knowledge during the course of any such inspection or examination, except in so far as he may be directed by the commission, or by a court or judge thereof, or authorized by law, shall be guilty of a misdemeanor.

4. **[As to uniform system of accounts.]*** Have power, in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by the persons, corporations and municipalities engaged in the manufacture, sale and distribution of gas and electricity for light, heat or power.

5. **[To inquire as to methods, etc.]*** Examine all persons, corporations and municipalities under its supervision, keep informed as to the methods employed by them in the transaction of their business and see that their property is maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters.

6. **[As to annual reports.]*** Require every person and corporation under its supervision to submit to it an annual report, verified by the oath of the president, treasurer, or general manager thereof, showing in detail (1) the amount of its authorized capital stock and the amount thereof issued and outstanding; (2) the amount of its authorized bonded indebtedness and the amount of its bonds and other forms of evidence of indebtedness issued and outstanding; (3) its receipts and expenditures during the preceding year; (4) the amount paid as dividends upon its stock and as interest upon its bonds; (5) the name of, and the amount paid as salary to each officer and the amount paid as wages to its employees; (6) the location of its plant or plants and system, with a full description of its property and franchises, stating in detail how each franchise stated to be owned was acquired, and (7) such other facts pertaining to the operation and maintenance of the plant and system, and the affairs of such person or corporation as may be required by the commission. Such reports shall be in the form, cover the period and be submitted at the time prescribed by the commission. The commission may, from time to time, make changes

* Matter in brackets not a part of the section as enacted.

and additions in such forms, giving to the persons, corporations and municipalities six months' notice before the time fixed by the commission as the expiration of the fiscal year of any changes or additions which would require any alteration in the method or form of keeping their accounts for the ensuing year. When any such report is defective or believed to be erroneous, the commission shall notify the person, corporation or municipality making such report to amend the same within thirty days. Any such person or corporation or municipality which shall neglect to make any such report within the time specified by the commission, or which shall fail to correct any such report within thirty days after notice, shall be liable to a penalty of one hundred dollars and an additional penalty of one hundred dollars for each day after the prescribed time for which it shall neglect to file or correct the same, to be sued for in the name of the people of the state of New York. The amount recovered in any such action shall be paid into the state treasury and be credited to the general fund. The commission may extend the time herein limited for cause shown.

7. [Reports by municipal plants.]* Require each municipality engaged in operating any works or systems for the manufacture and supplying of gas or electricity to make an annual report to the commission, verified by the oath of the general manager or superintendent thereof, showing in detail, (1) the amount of its authorized bonded indebtedness and the amount of its bonds and other forms of evidence of indebtedness issued and outstanding for lighting purposes, (2) its receipts and expenditures during the preceding year, (3) the amount paid as interest upon its bonds and upon other forms of evidence of indebtedness, (4) the name of and the amount paid to each person receiving a yearly or monthly salary, and the amount paid as wages to employees, (5) the location of its plant and system with a full description of the property, and (6) such other facts pertaining to the operation and maintenance of the plant and system, as may be required by the commission. Such report shall be in the form, cover the period and be submitted at the time prescribed by the commission.

8. [To inspect plants.]* Have power, either through its members or inspectors or employees duly authorized by it, to enter in or upon and to inspect the property, buildings, plants, factories, power houses and offices of any of such corporations, persons or municipalities.

*Matter in brackets not a part of the section as enacted.

9. [To examine books.]* Have power to examine the books and affairs of any such corporation, persons or municipalities, and to compel the production before it of books and papers pertaining to the affairs being investigated by it.

10. [To take testimony and subpoena witnesses.]* Have power, either as a commission or through its members, to subpoena witnesses, take testimony and administer oaths to witnesses in any proceeding or examination instituted before it, or conducted by it in reference to any matter within its jurisdiction under this article.

Control of The City of New York over the manufacture and supply of gas and electricity,—see Greater N. Y. Ch., §§ 468, 469, 519, 521-526.

Similar section under New York Gas & Electricity Commission Act,—see N. Y. Gas & El. Com. Act, § 9.

Powers of former Board of Rapid Transit Railroad Commissioners as to wires, pipes, conduits, etc.,—see N. Y. Rap. Tr. Act, §§ 6, 39, L. 1906, ch. 109, § 3, post, Appendix A.

“Gas corporation” and “electrical corporation” defined,—see ante, § 2, [subd. L.], [subd. K.].

Each Commission shall possess all powers necessary or proper to enable it to carry out the purposes of this Act,—see post, § 4.

Powers and procedure of Commission upon investigations generally,—see ante, §§ 11, 19, 20, 45.

Power of Commission to require annual and special reports from common carriers,—see ante, § 46.

Power of Commission to prescribe uniform accounts for common carriers,—see ante, § 52.

General rules of statutory construction,—see ante, § 1, notes [23]-[40]. Where hearings will be held,—see ante, § 19, note [1].

Compelling production of books and papers,—see ante, § 19, notes [3]-[6].

Punishment of witnesses for contempt,—see ante, § 19, notes [7]-[12]. Commission not bound by technical rules of procedure,—see ante, § 20, note [1].

Immunity of witnesses,—see ante, § 20, notes [2]-[9].

Effect of vacancies on power of Commission,—see ante, § 4, note [5]. Unlawful charge as defense to action to recover for gas or electricity used,—see post, § 75, note.

*Matter in brackets not a part of the section as enacted.

[1] Necessity for legislative authority to make and sell gas.

The making and selling of gas is not a prerogative of government and may be carried on by any person without legislative authority.—*Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242.

[2] Charters and franchises of gas and electrical corporations.

Obligations imposed by franchises,—see post, notes [7]–[10].

Questions as to charters and franchises generally,—see ante, § 1, notes.

Right of corporation to fix price of gas as incident to powers given in charter,—see ante, § 1, note [9].

Franchise grants construed favorably to the public right,—see ante, § 1, note [30].

Franchises to be a corporation and franchises to operate,—see post, § 68, note [5].

A franchise to lay mains in the streets of a city and supply water to its inhabitants, in consideration of the performance of a public service, is, after performance by the grantee, a contract protected by the U. S. Constitution against state acts to impair it.—*Walla Walla v. Walla Walla W. Co.*, 172 U. S. 1, 19 Sup. Ct. R. (U. S.) 77.

At a time when electricity was not used for lighting purposes, a corporation was chartered with power to light the city of St. Louis and to lay pipes for that purpose, “with as much despatch and as little inconvenience to the public as possible.” It originally furnished light by means of gas and later furnished electric light through overhead wires.—*Held*, that the charter provisions did not give the right to lay electric wires underground without reference to the directions or regulations of the city on that subject.—*Missouri ex rel. Laclede Gas L. Co. v. Murphy*, 170 U. S. 73, 18 Sup. Ct. R. (U. S.) 505, affg. s. c. 130 Mo. 10, 31 S. W. 594.

A legislative grant of an exclusive franchise to a gas company is a contract protected by the U. S. Constitution against state legislation to impair it.—*New Orleans Gas Co. v. La. Light Co.*, 115 U. S. 650, 6 Sup. Ct. R. (U. S.) 252, revg. s. c. 11 Fed. 277; *New Orleans W. W. Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. R. (U. S.) 273; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 6 Sup. Ct. R. (U. S.) 265.

The issuance of a charter to a corporation, authorizing it to manufacture and vend gas, necessarily implies the right to charge a reasonable rate for the gas furnished, and the state cannot thereafter modify, change or alter the charter rights of the corporation.—*Cleveland Gaslight & Coke Co. v. City of Cleveland*, 71 Fed. 610.

A franchise to operate electrical conductors in the streets is property.—*Matter of Long Acre El. L. & P. Co.*, 188 N. Y. 361; *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255n.

A franchise to operate electrical conductors in the streets is property, taxable, alienable, subject to levy and sale under execution, etc., as such.—*Matter of Long Acre El. L. & P. Co.*, 188 N. Y. 361; *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255n.

An electrical corporation was empowered by its charter to take by eminent domain any water rights or land for the purpose of constructing and maintaining its dams and for the establishment of its plant.—*Held*, that the term "plant" included its wires and poles.—*Brown v. Gerald*, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472.

The power reserved to alter, modify or repeal the charter of a gas corporation authorizes legislative action fixing the maximum prices to be charged for gas by such corporation.—*State ex rel. Atty.-Gen. v. Cincinnati Gas L. & C. Co.*, 18 Oh. St. 262.

A franchise to manufacture and furnish illuminating gas does not authorize furnishing natural gas.—*Findlay Gaslight Co. v. Findlay*, 1 Oh. Circ. Dec. 463.

An electrical corporation was given the right by statute to use the streets of a city for the distribution of electricity.—*Held*, that the sidewalks being a part of the streets, conduits might be maintained under the sidewalks.—*Allegheny Co. L. Co. v. Booth*, 216 Pa. 564, 66 Atl. 72.

The granting by a city of a franchise, which is not exclusive, to an electric lighting corporation does not prevent the city from granting a similar right to another company or exercising such right itself.—*Crouch v. City of McKinney*, — Tex. Civ. App. —, 104 S. W. 518.

[3] Who may disaffirm franchises.

As long as a gas company uses the streets of a city to distribute gas to patrons by virtue of a contract with the city in which the maximum price of gas is fixed, such company cannot question the power of the city to make such a contract. That may be done only by the state.—*Muncie Gas Co. v. Muncie*, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822.

[4] Legislative control—In general.

General power of the state to regulate property devoted to public use,— see ante, § 1, notes [1]–[22].

Reservation of power to alter or amend charters as affecting power to regulate,— see ante, § 1, note [12].

Exemptions from public control,— see ante, § 1, notes [16]–[21].

Electric lighting company as public service corporation,— see ante, § 2, note [9].

Effect of receivership on power to regulate,— see ante, § 2, note [15].

Power of the state to regulate rates and charges for gas and electricity,— see post, § 72, notes [1]–[3].

The production and distribution of natural gas for light, fuel and power affects the people generally to such an extent that it may be regarded as a business of a public nature, the control of which belongs to the state.—*La Harpe v. Elm Tp. Gas, L. F. & P. Co.*, 69 Kan. 97, 76 Pac. 448.

A gas corporation not vested with the power of eminent domain or any duty to supply gas to the public, is not a public corporation and hence is not subject to the regulative measures of the state.—*Commonwealth v. Lowell Gas. L. Co.*, 12 Allen (Mass.), 75.

Gas companies are invested with a special franchise from the public to subserve the public interest, and are subject to public control and supervision, through legislative authority, unless they are clearly protected by their charters from such regulations.—*State v. Columbus Gas Co.*, 34 Oh. St. 572.

The furnishing of gas and electricity to the inhabitants of a community, under a state or municipal grant, is a public business, subject to public regulation.—*City of Madison v. Madison Gas & Elect. Co.*, 129 Wis. 249, 108 N. W. 65.

[5] — Commission plan of regulation.

Validity of commission plan of regulation,—see also, ante, § 4, note [14].

The power of the state over gas and electrical corporations may be exercised by a commission provided the statute prescribes standards by which the commission is to be guided.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 341; *revd. on other grounds*, 191 N. Y. 123, 83 N. E. 693.

[6] — Extent of power.

Each Commission possesses all powers necessary or proper to enable it to carry out the purposes of this Act,—see ante, § 4.

Power of Commission to enforce inspection of gas meters,—see post, § 67.

Power of Commission to fix price of gas or electricity,—see post, § 72.

Power of Commission to regulate quality of service by gas or electrical corporations,—see post, § 72.

In September, an ordinance was passed prescribing the limits within which gas works might be built. Thereafter a permit was issued for a plant, and work begun thereon. In November, new limits, excluding the site on which such plant was being built, were fixed, no change in the character of the neighborhood having taken place.—*Held*, that this was an arbitrary and unreasonable exercise of the police power, and is void as against the holder of the permit.—*Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. R. (U. S.) 18.

An act transferring from one set of public functionaries to another the expressly reserved power of the state to regulate the use of the streets, etc., so as not to injuriously affect the public interests, does not impair the obligation of franchise contracts of electric companies.—*People ex rel. N. Y. Elect. L. Co. v. Squire*, 145 U. S. 175, 12 Sup. Ct. R. (U. S.) 880, affg. s. c. 107 N. Y. 593, 14 N. E. 820.

In granting an exclusive franchise to supply gas, the legislature does not part with the police power and duty of protecting the public health, morals and safety, as they may be affected by the exercise of that franchise by the grantee.—*New Orleans Gas Co. v. La. Light Co.*, 115 U. S. 650, 6 Sup. Ct. R. (U. S.) 273, revg. s. c. 11 Fed. 277; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 6 Sup. Ct. R. (U. S.) 265.

A state statute authorizing the city of New York to compel electric wires to be placed underground, is a proper exercise of police power.—*Western U. Tel. Co. v. Mayor*, 38 Fed. 552, 3 L. R. A. 449.

The attorney-general cannot maintain an action to restrain a gas company from laying pipes in a city street, on the ground that its corporate powers have ceased to exist, and the laying of the pipes would create a nuisance, where the state has delegated to various officials acting under the charter of the said city, ample power to protect and maintain the streets of that city.—*People v. Equity Gas L. Co.*, 141 N. Y. 232, 36 N. E. 194.

The legislature may properly pass an act permitting a municipality to compel electric wires to be placed in conduits beneath the surface of the streets.—*Matter of City of Geneva*, 30 Misc. (N. Y.) 236, 62 N. Y. Supp. 172; revd. without opinion, 54 App. Div. (N. Y.) 617, 66 N. Y. Supp. 1129.

An order of the board of electrical control, that electrical companies discontinue the use of all overhead wires not properly insulated, is valid, as such wires are dangerous to the public.—*U. S. Illum. Co. v. Grant*, 55 Hun (N. Y.), 222, 7 N. Y. Supp. 788.

The manufacture of gas is a lawful and necessary business and a county has no power to prohibit such manufacture, though it may, in the legitimate exercise of its powers, regulate its manufacture and the places thereof.—*In re Smith*, 143 Cal. 368, 77 Pac. 180.

An act prohibiting the conducting of natural gas to a point outside the state, is unconstitutional, as a regulation of the interstate commerce.—*Manufacturers' Gas & O. Co. v. Indiana Gas & O. Co.*, 155 Ind. 545, 58 N. E. 706, 53 L. R. A. 134.

A provision of statute that natural gas corporations shall supply all individuals along their lines requesting it, on payment or deposit of security, is valid.—*Rushville v. Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321n.

Power "to provide by ordinance reasonable regulations for the safe supply, distribution and consumption of natural gas" authorizes not merely regulations, conducing to safety, but confers full power to regulate the supply, distribution, and consumption of gas, including the power to fix reasonable maximum rates.—*Rushville v. Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321n.

The legislature may restrict the price charged for the use of meters.—*State v. Columbus Gas Co.*, 34 Oh. St. 572.

The power to regulate gas corporations implies the power and duty to investigate, and the power to investigate implies the power to obtain the facts, figures and data to make the investigation.—*Cline v. Springfield*, 7 Oh. N. P. 626.

[7] Rights and duties of gas and electrical corporations—In general.

Transfer of rights and duties by sale of franchise,—see post, § 70, note.

Duty to make reasonable and uniform charges,—see post, § 72, note [6].

A franchise for supplying gas not only confers a privilege, but imposes an obligation to serve the public in a reasonable way.—*People ex rel. Woodhaven Gas Co. v. Deehan*, 153 N. Y. 528, 47 N. E. 787.

An electrical company is bound to use due care and skill either in installing apparatus by its own agents, or in examining to see that it has been properly installed by others, and must inspect the apparatus to see if it is in proper condition for use.—*Hoboken Land & Imp. Co. v. United Elect. Co.*, 71 N. J. L. 430, 58 Atl. 1082.

Where a gas company has received permission to lay mains, etc., in a certain township, a subsequent division of the township does not affect the company's rights in all that territory.—*Public Service Corp. v. De Grote*, 70 N. J. Eq. 454, 62 Atl. 65.

The doctrine upon which the duty to the public of carriers and inn keepers rests does not apply to companies organized for the manufacture and sale of gas. Their duty to the individual, so far as he can enforce its performance, in the absence of contract, must be shown by their charter—*Commonwealth ex rel. Stern v. Wilkesbarre Gas Co.*, 2 Kulp (Pa.), 499.

[8] — Duty to supply gas or electricity.

Mandamus to compel furnishing of gas,—see post, § 74, note.

Under L. 1849, ch. 311, § 9, a gas company may shut off gas from the premises of a person who is in arrears, but the right to so shut off gas does not arise from arrears created by former occupants.—*Morey v. Metropolitan Gas L. Co.*, 38 N. Y. Super. Ct. 185.

A gas company will not be compelled to furnish gas to a consumer who is indebted to the company for gas previously furnished and who is insolvent.—*People v. Manhattan Gas L. Co.*, 45 Barb. (N. Y.) 136.

Gas companies possess, by virtue of their franchise or charter, powers and privileges which others cannot exercise, and the statutory duty is imposed upon them to furnish gas to applicants on payment of all moneys due.—*People v. Manhattan Gas Co.*, 45 Barb. (N. Y.) 136.

If an applicant for gas is already indebted to the company, the latter may shut off the supply of gas and refuse to furnish him.—*People v. Manhattan Gas Co.*, 45 Barb. (N. Y.) 136.

After an electrical company had installed a meter and made connections in a place of business, the consumer made further connections which were defective and dangerous.—*Held*, that under the circumstances the electrical company was not liable for damages caused by its refusal longer to furnish electricity.—*Benson v. American Ill. Co.*, — Misc. (N. Y.) —, 102 N. Y. Supp. 206.

It is not the duty of a gas company to furnish gas for lighting to a person who uses electricity for that purpose and proposes to use the gas only in case of accidents to the electric system.—*Fleming v. Montgomery L. Co.*, 100 Ala. 657, 13 So. 618.

The relations between gas companies and their customers are contractual merely, and as the one may refuse to take the article so the other may refuse to supply it. There is no reason for subjecting the maker of gas to duties and liabilities beyond those to which the manufacturers and venders of other commodities are subjected by the rules of law.—*McCune v. Norwich City Gas Co.*, 30 Conn. 521.

Where the general practice of an electrical corporation was to furnish transformers to its customers free, the refusal to connect a person's house with its electrical system without payment for the transformer, for the reason that that person had not employed the company to wire his house, is an unreasonable discrimination.—*Snell v. Clinton Elect. L. Co.*, 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284.

While an electrical corporation is not, in the absence of statutory provisions, bound to treat all its patrons with absolute equality, still it is bound to furnish light at a reasonable rate to every customer and without unjust discrimination.—*Snell v. Clinton Elect. L. Co.*, 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284.

Gas companies must supply all applicants on just and equal terms.—*People's Gas L. & C. Co. v. Hale*, 94 Ill. App. 406.

It is no justification of a refusal by a gas company to supply a person with gas, that the company was not organized for purposes of profit and that it has not a sufficient supply of gas to fully supply all customers.—*State ex rel. Wood v. Consumers Gas T. Co.*, 157 Ind. 345, 61 N. E. 674, 65 L. R. A. 245.

A gas company owes a duty to serve all persons who make proper application for such service.—*Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17.

It is the duty of gas companies to furnish gas to all applicants.—*Portland N. Gas & O. Co. v. State*, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639.

A gas company must furnish gas on terms and conditions common to all, and without discrimination. They cannot fix a variety of prices, or impose different terms or conditions, according to their caprice or whim. Their rules and regulations must be reasonable, and applicable to all consumers alike.—*Owensboro Gas Co. v. Hildebrand*, 19 Ky. L. R. 983, 42 S. W. 351.

If a public service corporation capriciously furnishes to some houses, etc., and refuses to furnish to others, thus giving a value to some properties and denying it to others, such conduct is an abuse of its franchise privilege, for which the courts will call it to account.—*Lumbard v. Stearns*, 4 Cush. (Mass.) 60.

A gas company is bound to supply gas, on reasonable conditions.—*Williams v. Mutual Gas Co.*, 52 Mich. 501, 18 N. W. 236.

The right to demand and the obligation to furnish gas must be subjected to reasonable terms.—*Public Service Corp. v. American L. Co.*, 67 N. J. Eq. 122, 57 Atl. 482.

The obligation to supply a building with gas, and for that purpose to lay a supply pipe and set a meter, is subject to the limitation that there shall exist a reasonable expectation that the consumption of gas shall be sufficient to warrant the necessary preliminary expenditure.—*Public Service Corp. v. American L. Co.*, 67 N. J. Eq. 122, 57 Atl. 482.

Where a gas corporation is incorporated under a charter giving power to furnish gas for the purpose of lighting the streets, buildings, manufactories and other places in a city, but granting no monopoly or special privileges, the company is under no obligation to furnish gas to all who desire it.—*Paterson Gas L. Co. v. Brady*, 27 N. J. L. 245.

A gas company having the sole right to make and vend gas in a city must supply gas to all persons who call for it, on their paying or offering to pay for the same.—*New Orleans Gas L. Co. v. Paulding*, 12 Rob. (La.) 378.

The grant by the legislature to a private corporation of the exclusive privilege to supply the inhabitants of a town or city with gas implies a duty also, and a corresponding right in the citizen, upon compliance with all reasonable regulations and upon proper conditions, to have his dwelling connected with its mains, which right he can enforce, even though the grant was unaccompanied by mandatory words.—*Commonwealth ex rel. Stern v. Wilkesbarre Gas Co.*, 2 Kulp (Pa.), 499.

[9] — Duty as to quantity supplied.

Where a gas company compels a customer to pay for gas in advance, it is bound to furnish him a suitable supply, and so long as it retains the money paid, cannot set up as a defense the fact that it did not have a sufficient quantity of gas.—*Indiana Gas Co. v. Anthony*, 26 Ind. App. 307, 58 N. E. 863.

[10] — Duty as to installation of meters.

A gas company is not required to install a separate meter for each floor of a house, unless separate service pipes are put in to connect with each meter.—*Ferguson v. Metropolitan Gas L. Co.*, 37 How. Pr (N. Y.) 189.

[11] — Right to make regulations.

L. 1906, ch. 125, which fixes the maximum price at which gas may be supplied in the city of New York does not repeal or modify N. Y. Transp. Corp. L., § 66, which provides that a gas corporation may require consumers to make a deposit with such corporation as security for the payment for gas consumed.—*Pollitz v. Consolidated Gas Co.*, 118 App. Div. (N. Y.) 92, 102 N. Y. Supp. 1017.

In the absence of statute, it is not unreasonable for a lighting company to require a prospective consumer to pay the cost of a transformer before furnishing him with electricity, and the fact that certain persons have been furnished with transformers without charge does not make out a case of unjust discrimination.—*Clinton Elect. L. H. & P. Co. v. Snell*, 95 Ill. App. 552.

A gas company cannot compel a particular customer to deposit money as security for future use of gas, when no such requirement is generally made.—*Owensboro Gas Co. v. Hildebrand*, 19 Ky. L. R. 983, 42 S. W. 351.

A gas corporation is under obligation to supply gas to the public generally, but subject to such reasonable rules and regulations as the company may adopt.—*Williams v. Mutual Gas Co.*, 52 Mich. 499, 18 N. W. 236.

A gas company can require those desiring gas to give security for the payment therefor, or to deposit a fair sum in advance, as a condition of supplying them. Requiring a \$100 deposit from a consumer using about \$60 worth of gas a week is not unreasonable.—*Williams v. Mutual Gas Co.*, 52 Mich. 499, 18 N. W. 236.

Gas companies may make such reasonable regulations as will protect their interests and further the designs of their incorporation.—*State ex rel. Weise v. Sedalia Gas L. Co.*, 34 Mo. App. 501.

[12] Application by prospective consumer.

A written application to be supplied with gas "as heretofore supplied" in a certain office by the return of the meter as it was placed

on the first of that month, is sufficiently definite to sustain an action for penalty.—*Bennett v. Eastchester Gas L. Co.*, 54 App. Div. (N. Y.) 74, 66 N. Y. Supp. 292, 40 App. Div. (N. Y.) 169, 57 N. Y. Supp. 847.

Under the statute requiring gas and electric light companies to furnish gas or electricity on application, under penalty of forfeiture, it is necessary that the application should state the number of lights or quantity of power desired, etc.—*Andrews v. North River Elect. L. & P. Co.*, 23 Misc. (N. Y.) 512, 51 N. Y. Supp. 872; *affd.* 24 Misc. (N. Y.) 671.

[13] Reports.

A city, empowered to regulate the price of gas furnished to its citizens, enacted an ordinance which provided that in order to enable the council to determine what would be a fair and reasonable price, all gas companies should file a verified annual report setting forth certain facts.—*Held*, that such an ordinance was within the power of the city and obedience thereto could be compelled in a proper civil proceeding.—*Cline v. Springfield*, 10 Oh. Dec. 389.

A legislative body having power to regulate the price of gas may compel the rendering of any reports or information desired, to enable it to act fairly and intelligently.—*Cline v. Springfield*, 7 Oh. N. P. 626.

[14] Protection from unreasonable regulation.

If the Board of Electrical Control arbitrarily refused to allow repairs to be made which were desired by the illuminating companies, and the regulations of the Board were unreasonable, the companies had ample remedies at law to compel the Board to give them proper permits.—*U. S. Ill. Co. v. Grant*, 55 Hun (N. Y.), 222, 7 N. Y. Supp. 788.

[15] Monopolistic agreements.

An agreement by one gas company not to furnish gas to patrons of another gas company is monopolistic and unlawful.—*State ex rel. Snyder v. Portland Nat. Gas Co.*, 153 Ind. 483, 53 N. E. 1089, 53 L. R. A. 413.

[16] Effect of monopoly.

A gas company sued to restrain enforcement of an ordinance fixing rates, and a master found the rates confiscatory. The court decided against the company on the single ground that it had been a monopoly unlawful under the laws of Illinois.—*Held*, that the case should be remanded for a new trial.—*Peoria Gas Co. v. Peoria*, 200 U. S. 48, 26 Sup. Ct. R. (U. S.) 214.

[17] Actions by consumer.

L. 1896, ch. 125, fixed the maximum price of gas furnished in the city of New York at 80 cents. The Consolidated Gas Co., obtained in a suit in the Circuit Court of the United States, in which the attorney-general of the state, the district attorney of New York County, The City of New York, and the Gas and Electricity Commission of the state, were made parties defendant, an injunction *pendente lite* which restrained the defendants from enforcing the provisions of the statute, provided that the gas company might make the same charges as formerly, and further provided that the difference between the old and new rate be paid into court, there to remain until final adjudication of the cause.—*Held*, that a consumer, not made a party to the suit in the federal court, was not by this injunction enjoined from bringing a suit in the Supreme Court of New York State to restrain the gas company from cutting off his supply of gas on account of his refusal to pay the old rates, nor was the Supreme Court prohibited from entertaining such a suit.—*Richman v. Consolidated Gas Co.*, 186 N. Y. 209, 78 N. E. 871, affg. s. c. 114 App. Div. (N. Y.) 216, 100 N. Y. Supp. 81; *Grossman v. Consolidated Gas Co.*, 114 App. Div. 242, 100 N. Y. Supp. 100; affd. 186 N. Y. 541, 78 N. E. 1104, on opinion in *Richman v. Consolidated Gas Co.*

A person not a party to a bill in equity in the federal courts is at liberty to apply to any court of competent jurisdiction for the enforcement of his private rights, even if they be the same as those involved in the suit first brought in the federal court.—*Richman v. Consolidated Gas Co.*, 114 App. Div. (N. Y.) 216, 100 N. Y. Supp. 81; affd. on other points, 186 N. Y. 209, 78 N. E. 871.

If there is a suit pending between a gas company and a consumer as to the correctness of the former's charge, the latter is entitled to an injunction against the cutting off of the supply of gas until the case can be adjudicated.—*Sickles v. Manhattan Gas Co.*, 66 How. Pr. (N. Y.) 314, affg. s. c. 64 How. Pr. (N. Y.) 33.

The measure of damages for improper refusal to continue to supply gas includes any consequent deterioration in the value of the premises, on sale or rental, the cost of removing the gas fixtures, and restoring the premises, etc.—*Baltimore Gas L. Co. v. Colliday*, 25 Md. 1.

[18] Penalties.

N. Y. Transp. Corp. Law, § 65, provided that upon demand for the furnishing of gas, and a failure of a gas company to furnish the same within a certain time, the latter should be liable to a penalty of \$10. and a further sum of \$5, for each and every day it so failed to furnish gas. A gas company having refused to furnish gas to a property owner, the latter brought suit and recovered the amount of the penalty

which had accrued up to the bringing of the action.—*Held*, that the cause of action for the penalty was single and indivisible and but one recovery could be had therefor and therefore the property owner could not bring a subsequent action to recover the \$5 per day accruing after the recovery in the first action, a further demand and refusal being necessary before another cause of action accrued.—*Jones v. Rochester Gas & El. Co.*, 168 N. Y. 65, 60 N. E. 1044, revg. s. c. 45 App. Div. (N. Y.) 629, 64 N. Y. Supp. 138.

A written demand is a condition precedent to the recovery of a penalty under L. 1890, ch. 566, § 65, for refusal or failure to furnish gas, and the fact that the company commenced supplying gas without the written application does not render it liable to the penalty immediately upon discontinuing service.—*Shelley v. Westchester L. Co.*, 119 App. Div. (N. Y.) 61, 103 N. Y. Supp. 951.

N. Y. Transp. Corp. L., § 65, provides a penalty for failure or refusal of an electric lighting company to furnish electricity to persons whose property is located within one hundred feet of the wires of such company.—*Held*, that no penalty is incurred for refusal to furnish electricity for the lighting of a house, where it appears that the wire which is within one hundred feet of the plaintiff's house carries a current which was too strong to be utilized for domestic purposes.—*Moore v. Champlain Elect. Co.*, 88 App. Div. (N. Y.) 289, 85 N. Y. Supp. 37.

Where, after application therefor, gas is furnished to a consumer for a short time and then is cut off, no penalty can be recovered under L. 1900, ch. 566, for refusal to supply gas, until there has been a new application, and a refusal to supply.—*Shelly v. Westchester L. Co.*, 55 Misc. (N. Y.) 105, 105 N. Y. Supp. 133.

After plaintiff had brought action in the Supreme Court to compel an electrical corporation to restore its wire connections with his house, defendant asked that court to grant an interlocutory order restraining the plaintiff from prosecuting in municipal court an action to recover from the defendant certain statutory penalties for refusing electric light to him.—*Held*, that even if the court has power to stay proceedings in another and inferior tribunal, the power can be justified only in an extreme emergency.—*Gould v. Edison Elect. Ill. Co.*, 26 Misc. (N. Y.) 64, 56 N. Y. Supp. 465.

A statute imposing penalties for refusal or neglect to supply "electric light as required," must be strictly construed, and requisition therefore must be in writing.—*Andrews v. North R. Elect. L. & P. Co.*, 24 Misc. (N. Y.) 671, 53 N. Y. Supp. 810, affg. s. c. 23 Misc. (N. Y.) 512, 51 N. Y. Supp. 872.

§ 67. Inspection of gas and electric meters.—

1. Each commission shall appoint inspectors of gas and electric meters whose duty it shall be when required, to inspect, examine, prove and ascertain the accuracy of any and all gas meters used or intended to be used for measuring or ascertaining the quantity of illuminating or fuel gas or natural gas furnished by any gas corporation to or for the use of any person and any and all electric meters used or intended to be used for measuring and ascertaining the quantity of electrical current furnished for light, heat and power by any electrical corporation to or for the use of any person or persons and when found to be or made to be correct, the inspector shall stamp or mark all such meters and each of them with some suitable device, which device shall be recorded in the office of the secretary of state.

2. No corporation or person shall furnish or put in use any gas meter which shall not have been inspected, proved and sealed, or any electric meter which shall not have been inspected, approved, stamped or marked by an inspector of the commission. Every gas and electrical corporation shall provide or keep in and upon its premises a suitable and proper apparatus, to be approved and stamped or marked by the commission, for testing and proving the accuracy of gas and electric meters furnished for use by it, and by which apparatus every meter may and shall be tested, on the written request of the consumer to whom the same shall be furnished, and in his presence if he desires it.

If any consumer to whom a meter has been furnished, shall request the commission in writing to inspect such meter, the commission shall have the same inspected and tested; if the same on being so tested shall be found to be, four per cent. if an electric meter, or two per cent. if a gas meter, defective or incorrect to the prejudice of the consumer, the inspector shall order the gas or electrical corporation forthwith to remove the same and to place instead thereof a correct meter, and the expense of such inspection and test shall be borne by the corporation; if the same on being so tested shall be found to be correct the expense of such inspection and test shall be borne by the consumer. A uniform reasonable charge shall be fixed by the commission for this service.

Power of Commissioner of Water Supply, Gas & Electricity of The City of New York, to test meters,—see Greater N. Y. Ch., §§ 469, 519.

Power of former Commission of Gas & Electricity as to inspection of meters,—see N. Y. Gas & El. Com. Act, § 10.

Appointment, salary, general office, etc., of former Inspector of Gas Meters,—see N. Y. Transp. Corp. L., § 62.

Deputy Inspectors of Gas Meters and employees of former Inspector of Gas Meters,—see N. Y. Transp. Corp. L., § 63.

Provisions of Transportation Corporation Law as to inspection of gas meters,—see N. Y. Transp. Corp. L., § 64.

Effect of inspections of gas meters made before the passage of this Act,—see post, § 82.

Office of Inspector of Gas Meters abolished, and his powers and duties transferred to the Public Service Commissions,—see post, § 82.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

Exemption from public control,—see ante, § 1, notes [16]–[21].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Effect of vacancies on power of Commission,—see ante, § 4, note [5].

Validity of Commission plan of regulation,—see ante, § 4, note [14].

Requiring the expenses of a state railroad commission to be borne by the corporations inspected, is constitutional.—*Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. R. (U. S.) 255.

The court does not perceive the impracticability of inspection of meters, etc., as alleged by the defendant gas company, or its great expense.—*Schmeer v. Gas. L. Co.*, 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653, revg. s. c. 26 N. Y. Supp. 1128.

A gas meter, even after being tested and inspected pursuant to law, is not conclusive of the correctness of the quantity of gas a consumer is charged for, but the registry may be attacked by other proper evidence.—*Sickles v. Manhattan Gas Co.*, 66 How. Pr. (N. Y.) 314, 64 How. Pr. (N. Y.) 33.

A meter which has been neither sealed nor inspected cannot be accepted as a standard of measurement, in an action by a gas company to recover the price of gas furnished.—*Manhattan Gas Co. v. Flamme*, 12 N. Y. Wkly. Dig. 245.

When a meter is installed in the house of a consumer, there is no bailment, from which the consumer can claim the right to use it for any reasonable purpose.—*Blondell v. Consolidated Gas Co.*, 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187.

§ 68. Approval of incorporation and franchises; certificate; * [permits for a municipal system].—No gas corporation or electrical corporation incorporated under the laws of this or any other state shall begin construction, or exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised without first having obtained the permission and approval of the proper commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation,† showing that it has received the required consent of the proper municipal authorities. No municipality shall build, maintain and operate for other than municipal purposes any works or systems for the manufacture and supplying of gas or electricity for lighting purposes without a certificate of authority granted by the commission. If the certificate of authority is refused, no further proceedings shall be taken before the commission, but a new application may be made therefor after one year from the date of such refusal.

As to granting of franchises by The City of New York,—see Greater N. Y. Ch., §§ 71-77.

Ordinances of municipalities consolidated to form Greater New York, relating to franchises or grants of rights, are subject to modification, amendment or repeal by the Board of Estimate and Apportionment,—see Greater N. Y. Ch., § 41.

Ordinances made by the Board of Aldermen of New York City as to the use of streets do not affect any franchise or grant authorized or approved by the Board of Estimate and Apportionment or the former Board of Rapid Transit Railroad Commissioners,—see Greater N. Y. Ch., § 50, as amd. by L. 1905, ch. 629, § 9.

Powers of Board of Estimate and Apportionment of New York City as to franchises,—see Greater N. Y. Ch., § 242, as amd. by L. 1905, ch. 629, § 14.

Parallel provision of N. Y. Gas & Electricity Commission Act,—see N. Y. Gas & El. Com. Act, § 11.

Approval by Commissions of organization and franchises of railroad corporations,—see ante, § 53.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]-[22].

Exemption from public control,—see ante, § 1, notes [16]-[21].

General rules of statutory construction,—see ante, § 1, notes [23]-[40].

*Words in brackets not a part of section heading as enacted.—Ed.

†So in the original

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Effect of vacancies on power of Commission,—see ante, § 4, note [5].

Validity of Commission plan of regulation,—see ante, § 4, note [4].

[1] Organization of gas corporation.

A corporation formed Dec. 21, 1895, to bore natural gas wells, and pipe and sell gas, was properly organized under the N. Y. Business Corporations Law and not under the N. Y. Transportation Corporations Law.—*Wilson v. Tennent*, 61 App. Div. (N. Y.) 100, 70 N. Y. Supp. 2, affg. s. c. 32 Misc. (N. Y.) 273, 65 N. Y. Supp. 852; affd. 179 N. Y. 546, 71 N. E. 1142.

[2] Municipal and legislative consents.

The right to grant or withhold consent to the occupation of the streets of a municipality for electric lighting purposes is one thing; the right to regulate such occupation after consent is given is another thing.—*People ex rel. W. S. El. Co. v. Consolidated T. & E. S. Co.*, 187 N. Y. 58, 79 N. E. 892.

Under the Greater New York Charter, the administrative officers of the city are not authorized to grant franchises or "consents" to a gas corporation, etc., but such franchise must come only from the municipal legislature, in the absence of express and unequivocal provision of the state legislature to the contrary.—*Ghee v. Northern Union Gas Co.*, 158 N. Y. 510, 53 N. E. 692, revg. s. c. 34 App. Div. (N. Y.) 551, 56 N. Y. Supp. 450.

The consent of local authorities of a town that a gas company might place gas conduits in the streets of the town, gives a right to use not only streets then existing, but streets thereafter opened or used.—*People ex rel. Woodhaven Gas Co. v. Deehan*, 153 N. Y. 528, 47 N. E. 785, revg. 11 App. Div. (N. Y.) 175, 42 N. Y. Supp. 1071.

It is competent for the legislature to provide for the creation of gas corporations and for the laying of pipes and mains in streets and other highways in order to transport gas to consumers.—*La Harpe v. Elm Tp. Gas, L. F. & P. Co.*, 69 Kan. 97, 76 Pac. 448.

Only the state can confer the right to use public streets for the transmission and sale of electricity.—*Purnell v. McLane*, 98 Md. 589, 56 Atl. 830.

[3] Municipal lighting.

The erection of a municipal gas plant, where the city already has granted a franchise to an existing plant, is not an impairment of contract.—*Hamilton Gas L. & C. Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. R. (U. S.) 90.

A municipality may supply not only itself but its inhabitants with electric lights.—*Hequembourg v. Dunkirk*, 49 Hun (N. Y.), 553, 2 N. Y. Supp. 447.

A municipality has inherent power, independent of statutory authorization, to erect plants and procure equipment for furnishing light for its streets and public places.—*Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268n.

The legislature may confer power upon a municipality to manufacture gas or electricity for its own use in lighting and for the purpose of selling the same to its own citizens.—*Opinion of Justices*, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487n.

Where the capacity of a municipal electric lighting plant is greater than is necessary for the lighting of the streets of the city, the city has power to sell the excess to private citizens.—*Crouch v. City of McKinney*, — Tex. Civ. App. —, 104 S. W. 518.

[4] Contracts with municipality.

The grant to a municipality of power to confer the privilege of furnishing light for the streets thereof and to the inhabitants of said municipality does not necessarily grant the power to make such privilege exclusive.—*Water, Light & Gas Co. of Hutchinson v. Hutchinson*, 207 U. S. 385, 28 Sup. Ct. R. (U. S.) 135, affg. s. c. 144 Fed. 256.

The power of a municipality to grant an exclusive privilege must be expressly given to it, or if inferred from other powers, must be indispensable to them.—*Water, Light & Gas Co. of Hutchinson v. Hutchinson*, 207 U. S. 385, 28 Sup. Ct. R. (U. S.) 135, affg. s. c. 144 Fed. 256.

The borough of Muncie was authorized by the legislature to light its streets and to manufacture electricity to supply its inhabitants.—*Held*, that these provisions empower the borough to make a ten-year exclusive contract with a private company, with an option in the borough to renew or purchase at the expiration of the ten years.—*Muncy Elec. L. H. & P. Co. v. Peoples' Elect. L. H. & P. Co.*, 218 Pa. 636, 67 Atl. 956.

[5] Limit of period of corporate existence.

The fact that a municipal franchise to a gas corporation to dig into the streets for the purpose of laying gas pipes is limited to a certain term of years, in no way limits the period of corporate existence of the corporation.—*Matter of Consolidated Gas Co.*, 56 Misc. (N. Y.) 49.

§ 69. Approval of issues of stock, bonds and other forms of indebtedness; *[merger; capitalization of franchises].—A gas corporation or electrical corporation organized or existing, or hereafter incorporated, under or by

*Words in brackets not a part of section heading as enacted.—Ed.

virtue of the laws of the state of New York, may issue stocks, bonds, notes or other evidence of indebtedness payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its plant or distributing system, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations, provided and not otherwise that there shall have been secured from the proper commission an order authorizing such issue, and the amount thereof, and stating that, in the opinion of the commission, the use of the capital to be secured by the issue of such stock, bonds, notes or other evidence of indebtedness is reasonably required for the said purposes of the corporation. For the purpose of enabling it to determine whether or not it should issue such an order, the commission shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents or contracts as it may deem of importance in enabling it to reach a determination. Such gas corporation or electrical corporation may issue notes, for proper corporate purposes and not in violation of any provision of this or of any other act, payable at periods of not more than twelve months without such consent; but no such notes shall, in whole or in part, directly or indirectly be refunded by any issue of stock or bonds or by any evidence of indebtedness running for more than twelve months without the consent of the proper commission. Provided, however, that the commission shall have no power to authorize the capitalization of any franchise to be a corporation or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the state or to any political subdivision thereof as the consideration for the grant of such franchise or right. Nor shall the capital stock of a corporation formed by the merger or consolidation of two or more other corporations, exceed the sum of the capital stock of the corporations, so consolidated, at the par value thereof, or such sum and any additional sum actually paid in cash; nor shall any contract for consolidation or lease be capitalized in the stock of any corporation whatever; nor shall any corporation hereafter issue any bonds against or as a lien upon any contract for consolidation or merger.

*Parallel provisions of New York Gas & Electricity Commission Act,
— see N. Y. Gas & El. Com. Act, § 12.*

Approval of issues of stocks, bonds, etc., by railroad corporations,—
see ante, § 55.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

Exemption from public control,—see ante, § 1, notes [16]–[21].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Effect of vacancies on power of Commissions,—see ante, § 4, note [5].

Validity of commission plan of regulation,—see ante, § 4, note [14].

Compelling production of books and papers,—see ante, § 19, notes [3]–[6].

Punishment of witnesses for contempt,—see ante, § 19, notes [7]–[12].

Commission not bound by technical rules of procedure,—see ante, § 20, note [1].

Immunity of witnesses,—see ante, § 20, notes [2]–[9].

A light and power company made application under N Y. Pub. Serv. Com. L., § 69, for authority to issue ten-year 5 per cent. debenture bonds to the extent of \$350,000 bearing 8 per cent. interest, convertible at the option of the holders, not less than two years from date and prior to maturity, into common stock of the corporation at par. The Commission approved the issue to the extent of \$330,000 provided that the conversion into common stock should take place only upon a particular day in each year fixed by the corporation, with at least thirty days' notice to the corporation by bondholders and upon previous formal approval of such conversion by the Commission upon application in writing by the corporation.—*Application of Newburgh L. H. & P. Co.* Decided by the N. Y. Public Service Commission of the Second District, April 29, 1908.

It is not now lawful for electrical corporations subject to the provisions of the Public Service Commissions Law to issue stock in payment of a dividend. Such purpose is not one of the purposes enumerated in section 69 of that law for which issues of stock may be made.—*Application of Babylon Elect. L. Co.* Decided by the N. Y. Public Service Commission of the Second District, March 9, 1908.

A statute of New Jersey provided that whenever it might be necessary for a gas company incorporated under an act of that state to increase its bonded indebtedness, it might by a vote of the directors after consent of a majority of stockholders, increase its bonded indebtedness to any amount not exceeding two-thirds of its capital stock.

—*Held*, that this act permitted such issue to corporations formerly restricted to a less amount, but did not restrict the powers of corporations already possessing power to create a greater bonded indebtedness.
—*Thatcher v. Consumers' Gas Co.*, — N. J. Eq. —, 66 Atl. 934.

§ 70. Approval of transfer of franchise; * [holding companies].—No gas corporation or electrical corporation shall transfer or lease its franchises, works or system or any part of such franchise, works or system to any other person or corporation or contract for the operation of its works and system, without the written consent of the proper commission. The permission and approval of the commission, to the exercise of a franchise under section sixty-eight of this act, or to the assignment, transfer or lease of a franchise under this section shall not be construed to revive or validate any lapsed or invalid franchise or to enlarge or add to the powers and privileges contained in the grant of any franchise or to waive any forfeiture. No such corporation shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business, or proposing to operate or operating under a franchise from the same or any other municipality, unless authorized so to do by the commission. Save where stock shall be transferred or held for the purpose of collateral security only with the consent of the commission empowered by this act to give such consent, no stock corporation of any description, domestic or foreign, other than a gas or electrical corporation, shall purchase or acquire, take or hold, more than ten per centum of the total capital stock issued by any gas corporation or electrical corporation organized or existing under or by virtue of the laws of this state. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation, in violation of any provision of this act, shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such gas corporation, or electrical corporation, or shall be recognized as effective for any purpose.

Power of former Gas and Electricity Commission as to the transfer of franchises and the acquiring of stocks or bonds of other corporations.—see N. Y. Gas & El. Com. Act, § 13.

*Words in brackets not a part of section heading as enacted.—Ed.

Approval of transfer of franchises by railroad corporations,—see ante, § 54.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

Exemption from public control,—see ante, § 1, notes [16]–[21].

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Effect of receivership on power to regulate,—see ante, § 2, note [15].

Effect of vacancies on power of Commission,—see ante, § 4, note [5].

Validity of commission plan of regulation,—see ante, § 4, note [14].

A corporation cannot disable itself by contract from the performance of public duties which it has undertaken.—*Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 9 Sup. Ct. R. (U. S.) 553.

The sale of the franchise of an insolvent electrical corporation, at public auction by the receiver, transfers to the purchaser all the rights vested in the defunct corporation by the original franchise grant.—*Matter of Long Acre El. L. & P. Co.*, 188 N. Y. 361.

A gas corporation, without legislative sanction or authority, executed a lease of its property and franchises to another corporation, which entered into possession of the demised property and used the same.—*Held*, that while as to the public such lease was void, as to the lessee, not being *malum in se* or *malum prohibitum*, it was not absolutely void, and there could be recovery of rent due under the lease.—*Bath Gas L. Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664, affg. s. c. 74 Hun (N. Y.), 638, 26 N. Y. Supp. 287.

The court will deny the application of the attorney-general of the state for leave to bring an action to annul a corporation on the grounds that it was formed by an unlawful merger and that it constitutes an unlawful monopoly, where it does not appear that the corporation has been guilty of serious transgressions or acts materially harming the public.—*Matter of Consolidated Gas Co.*, 56 Misc. (N. Y.) 49.

The provisions of N. Y. Stock Corporation Law, § 40, authorizing one corporation to acquire and hold the stock of other corporations on certain conditions, are not affected by L. 1897, ch. 383, and L. 1890, ch. 690, known as the Anti-Monopoly Statutes. Transfers of stock pursuant to that section are not prohibited by the New York laws against monopoly.—*Matter of Consolidated Gas Co.*, 56 Misc. (N. Y.) 49.

A lease by one gas company to another of its works and property for five years with privilege of renewal for five years longer, is invalid, as against non-consenting stockholders.—*Copeland v. Citizens' Gas L. Co.*, 61 Barb. (N. Y.) 60.

A private gas corporation cannot by contract with another gas company disable itself from performing its duty to the public.—*Chicago Gas L. Co. v. People's Gas L. Co.*, 121 Ill. 530, 13 N. E. 169.

Consolidated companies become vested with the rights and privileges of the merging companies and are bound by all their obligations.—*People's Gas L. & C. Co. v. Hale*, 94 Ill. App. 406.

§ 71. Complaints as to quality and price of gas and electricity; investigation by commission; forms of complaints.—Upon the complaint in writing of the mayor of a city, the trustees of a village or the town board of a town in which a person or corporation is authorized to manufacture, sell or supply gas or electricity for heat, light or power, or upon the complaint in writing of not less than one hundred customers or purchasers of such gas or electricity in cities of the first or second class, or of not less than fifty in cities of the third class, or of not less than twenty-five elsewhere, either as to the illuminating power, purity, pressure or price of gas or the initial efficiency of the electric incandescent lamp supply, or the regulation of the voltage of the supply system used for incandescent lighting, or price of electricity sold and delivered in such municipality, the proper commission shall investigate as to the cause for such complaint. When such complaint is made, the commission may, by its agents, examiners and inspectors, inspect the works, system, plant and methods used by such person or corporation in manufacturing, transmitting and supplying such gas or electricity, and may examine or cause to be examined the books and papers of such person or corporation pertaining to the manufacture, sale, transmitting and supplying of such gas or electricity. The form and contents of complaints made as provided in this section shall be prescribed by the commission. Such complaints shall be signed by the officers, or by the customers, purchasers or subscribers making them, who must add to their signatures their places of residence, by street and number, if any.

Power of Commissioner of Water Supply, Gas and Electricity of The City of New York, as to the inspection and testing of gas and electricity supplied to the city,—see Greater N. Y. Ch., §§ 469, 519.

City Inspectors of Illuminating Gas,—see Greater N. Y. Ch., § 522.

Parallel provisions of New York Gas and Electricity Commission Act,
— see N. Y. Gas & El. Com. Act, §§ 15, 16.

Complaints as to rates of, or service by, common carriers,— see ante,
§ 48.

General rules of statutory construction,— see ante, § 1, notes [23]–[40].

Effect of vacancies on power of Commission,— see ante, § 4, note [5].

Validity of commission plan of regulation,— see ante, § 4, note [14].

Commissions as administrative bodies,— see ante, § 4, note [15].

Compelling production of books and papers,— see ante, § 19, notes
[3]–[6].

Punishment of witnesses for contempt,— see ante, § 19, notes [7]–[12].

Commission not bound by technical rules of procedure,— see ante, § 20,
note [1].

Principles governing allowance of amendments to complaints,— see
ante, § 20, note [1].

Immunity of witnesses,— see ante, § 20, notes [2]–[9].

General power of Commission to conduct investigation,— see ante, § 48,
note [1].

§ 72. Notice and hearing; order fixing price of gas or electricity, or requiring improvement.— Before proceeding under a complaint presented as provided in section seventy-one, the commission shall cause notice of such complaint, and the purpose thereof, to be served upon the person or corporation affected thereby. Such person or corporation shall have an opportunity to be heard in respect to the matters complained of at a time and place to be specified in such notice. If an investigation be instituted upon motion of the commission the person or corporation affected by the investigation may be permitted to appear before the commission at a time and place specified in the notice and answer all charges which may be preferred by the commission. After a hearing and after such investigation as may have been made by the commission or its officers, agents, examiners or inspectors, the commission within lawful limits may, by order, fix the maximum price of gas or electricity to be charged by such corporation or person, or may order such improvement in the manufacture or supply of such gas, in the manufacture, transmission or supply of such electricity, or in the methods employed by such person or corporation, as will in its judgment improve the service. The price so fixed by the commission shall be the maximum price to be charged by such person or corporation for gas or elec-

tricity in such municipality until the commission shall upon complaint as provided in this section or upon an investigation conducted by it on its own motion, again fix the maximum price of such gas or electricity. In determining the price to be charged for gas or electricity the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein.

Similar provisions as to hearings before former Gas and Electricity Commission,—see N. Y. Gas & El. Com. Act, § 17.

Procedure upon investigation of complaints against common carriers,—see ante, §§ 11, 19, 20, 45, 48.

Power of commissions to fix rates and service of common carriers,—see ante, § 49.

General rules of statutory construction,—see ante, § 1, notes [23]–[40]. Where hearings will be held,—see ante, § 19, note [1].

Compelling production of books and papers,—see ante, § 19, notes [3]–[6].

Punishment of witnesses for contempt,—see ante, § 19, notes [7]–[12]. Commission not bound by technical rules of procedure,—see ante, § 20, note [1].

Immunity of witnesses,—see ante, § 20, notes [2]–[9].

Effect of orders of Commission,—see ante, § 23, notes [1]–[3].

Review of orders,—see ante, § 23, notes [5]–[9].

Judicial restraint of orders,—see ante, § 23, notes [10]–[19].

Federal interference with orders of state commissions,—see ante, § 23, notes [20]–[28].

Judicial enforcement of orders,—see ante, § 57, notes.

General power to investigate,—see ante, § 66, note [6].

Right of gas corporation to require deposit to secure payment for gas consumed,—see ante, § 66, note [11].

Restraining collection of unreasonable rates,—see post, § 74, note.

Unlawful charge as defense to action to recover for gas or electricity used,—see post, § 75, note.

[1] Legislative control over rates and charges. —In general.

General power of the state to regulate property devoted to public use,—see ante, § 1, notes [1]–[22].

General power of the state to regulate rates and charges generally,— see ante, § 1, note [2].

Exemption from public control,— see ante, § 1, notes [16]–[21].

Effect of reservation of power to amend charter on power to regulate rates,— see ante, § 1, note [25].

Effect of receivership on power to regulate,— see ante, § 2, note [15].

Fixing rates as a legislative function,— see ante, § 4, note [18].

General power of state to regulate corporations furnishing gas and electricity,— see ante, § 66, notes [4]–[6].

The limitation upon the power of a city to fix rates, contained in the original charter of a gas company, does not extend to the lines it subsequently acquires, but it takes those companies and their properties subject to all the rights and powers the city had against them.—*People's Gas L. & C. Co. v. Chicago*, 194 U. S. 1, 24 Sup. Ct. R. (U. S.) 520, affg. s. c. 114 Fed. 384.

A state has a right to fix a proper rate for gas. *Prima facie* it is to be presumed that the state's rate is a proper one, and the burden is on the complainant to show it is not.—*Consolidated Gas Co. v. Mayer*, 146 Fed. 150.

Where it appeared that in fixing the price a private corporation might charge for gas, the action of the taxing district was arbitrary and the district went to the lowest limit possible, without any method whatever of inquiry to ascertain whether the rate fixed was reasonable or such as would enable the company to maintain its existence or to make a reasonable profit on the money invested in the enterprise, an injunction will be granted restraining the putting in effect of the rate.—*New Hampshire Gas & L. Co. v. City of Memphis*, 72 Fed. 952.

The legislature may regulate rates charged by gas corporations.—*Richman v. Consolidated Gas Co.*, 114 App. Div. (N. Y.) 216, 100 N. Y. Supp. 81; affd. on other points, 186 N. Y. 209, 78 N. E. 871.

The regulation of the price of gas by the state or municipalities is not the exercise of a police power which cannot be abridged by contract.—*State ex rel. St. Louis v. Laclede Gas Co.*, 102 Mo. 472, 14 S. W. 974, 15 S. W. 383.

The charter of a gas company is a contract between it and the state, and if the charter empowers the company to fix the price of its product, the state or city cannot, by subsequent legislation, regulate the rates of such company.—*State ex rel. St. Louis v. Laclede Gas Co.*, 102 Mo. 472, 14 S. W. 974, 15 S. W. 383.

The legislature has the power to fix the price at which gas or electric lights shall be supplied by one who enjoys a monopoly of the business by reason of an exclusive franchise, and such right may be delegated to the governing body of a public or municipal corporation.—*Wabaska Elect. Co. v. City of Wymore*, 60 Neb. 199, 82 N. W. 626.

The power reserved to alter, modify or repeal the charter of a gas corporation authorizes legislative action fixing the maximum prices to be charged for gas by such corporation.—*State ex rel. Attorney-General v. Cincinnati Gas L. & C. Co.*, 18 Oh. St. 262.

[2] — Regulation by commission.

Effect of vacancies on power of Commission,—see ante, § 4, note [5].

Validity of commission plan of regulation,—see also, ante, § 4, note [14].

Commissions as administrative bodies,—see ante, § 4, note [15].

The fixing of gas rates by a municipal commission created by the legislature is constitutional.—*Spring Valley Water Works v. Schottler*, 110 U. S. 347, 4 Sup. Ct. R. (U. S.) 48, affg. s. c. 62 Cal 69

The legislature may delegate to a commission created by it the power to fix the maximum rates to be charged by gas and electrical corporations.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123, 83 N. E. 693.

The power of the state to fix rates may be exercised by a commission provided there is a standard fixed by which the commission is to be guided.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 341; revd. on other grounds, 191 N. Y. 123, 83 N. E. 693.

Where a statute gives to a commission the power to fix maximum rates, it matters not whether the standard by which the commission is to be guided be fixed by common law or by the statute.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 341; revd. on other grounds, 191 N. Y. 123, 83 N. E. 693.

N. Y. Gas & El. Com. Act, § 17, which provides in part, "After such hearing and upon such investigation as may have been made by the commission, or its officers, agents or inspectors, the commission, within the limits prescribed by law, may fix the maximum price of gas or electricity," etc., fixes a standard of charges, controlling upon the commission. The clause "within the limits prescribed by law" fixes the standard, which is a reasonable rate.—*Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 341; revd. on other grounds, 191 N. Y. 123, 83 N. E. 693.

It is within the power of the legislature to authorize a subordinate legislative body to fix maximum prices to be charged for gas.—*People's Gas L. & C. Co. v. Hale*, 94 Ill. App. 406.

[3] — Judicial supervision.

Whether, in a given case, the charges of an electric lighting company are reasonable and uniform, is a proper subject of inquiry and determination by the courts.—*Gould v. Edison Elect. Ill. Co.*, 29 Misc. (N. Y.) 241, 60 N. Y. Supp. 559.

It is not necessary that the charter of a public service corporation should contain a provision that its charges be reasonable, etc., to enable the courts to prevent it from capriciously discriminating in the rendering of service and the rates therefor.—*Lumbard v. Stearns*, 4 Cush. (Mass.) 60.

Under a Pennsylvania statute authorizing the courts, upon the complaint of a buyer, to investigate the reasonableness of prices charged for gas and water and to order that the charges, if unjust, "shall be decreased," the court may order any particular item of charge decreased or name the maximum charge for the particular service, but is not justified in preparing a tariff of charges for the company and ordering the gas and water to be furnished at such rates.—*Brymer v. Butler Water Co.*, 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260.

Courts are limited to the question of reasonableness of charges made or ordered to be made, and cannot fix rates to be charged in the future.—*City of Madison v. Madison Gas & Elect. Co.*, 129 Wis. 249, 108 N. W. 65.

[4] Power to compel giving of information.

A legislative body having power to regulate the price of gas may compel the rendering of any reports or information desired, to enable it to act fairly and intelligently.—*Cline v. Springfield*, 7 Oh. N. P. 626.

[5] Power of corporation to fix rate as implied from charter.

The issuance of a charter to a corporation, authorizing it to manufacture and vend gas, necessarily implies the right to charge a reasonable rate for the gas furnished, and the state cannot thereafter modify, change or alter the charter right of the corporation.—*Cleveland Gaslight & Coke Co. v. City of Cleveland*, 71 Fed. 610.

The power to make and vend gas, conferred by a corporate charter, carries with it as an inevitable incident the right to fix the price of gas thus made and sold, so that by the terms of the charter of the company, its right to fix the price of its product is as much a part of its charter as if it was in terms set forth in the act of incorporation.—*State ex rel. St. Louis v. La Clede Gas Co.*, 102 Mo. 472, 14 S. W. 974, 15 S. W. 383.

[6] Duty to make reasonable and uniform charges.

That the rates of a corporation formed under the Transportation Corporations Law shall be reasonable, etc., is a part of its charter.—*City of Mt. Vernon v. N. Y. Interurban W. Co.*, 115 App. Div. (N. Y.) 658, 101 N. Y. Supp. 232.

An electric lighting company is generally subject to the principles which govern the relation of a common carrier to the public, and it may not discriminate between its customers.—*Armour Packing Co. v. Edison E. L. Co.*, 115 App. Div. (N. Y.) 51, 100 N. Y. Supp. 605.

A gas company, in exercising public franchises and special privileges, owes a duty to the public to furnish gas to its consumers at reasonable rates, which duty the legislature may regulate and the courts enforce.—*Richman v. Consolidated Gas Co.*, 114 App. Div. (N. Y.) 216, 100 N. Y. Supp. 81; affd. on other points, 186 N. Y. 209, 78 N. E. 871.

While an electrical corporation is not, in the absence of statutory provisions, bound to treat all its patrons with absolute equality, still it is bound to furnish light at a reasonable rate to every customer and without unjust discrimination.—*Snell v. Clinton Electric Light Co.*, 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284.

Rates for the supply of gas must be just and reasonable.—*People's Gas L. & C. Co. v. Hale*, 94 Ill. App. 406.

That a gas corporation for a period supplied illuminating gas for use for fuel purposes, and in spite of its higher quality charged less for it than the price fixed by ordinance for fuel gas, does not obligate the company to continue that standard of either purity or price.—*People's Gas L. & C. Co. v. Hale*, 94 Ill. App. 406.

A gas company, under a town ordinance, had an option of selling gas by meter or by a flat rate.—*Held*, this did not authorize putting a particular consumer on a meter rate which was relatively higher than the flat rate generally prevailing.—*Indiana Gas Co. v. State*, 158 Ind. 516, 63 N. E. 220, 57 L. R. A. 761.

Gas corporations are bound to serve the public upon reasonable terms and upon reasonable rates.—*Public Service Corp. v. Am. Lighting Co.*, 67 N. J. Eq. 122, 57 Atl. 482.

An electric lighting company may not arbitrarily fix the price at which it will furnish light.—*Cincinnati, H. & D. R. Co. v. Bowling Green*, 57 Oh. St. 336, 49 N. E. 121, 41 L. R. A. 422n.

A gas corporation, having rights in the nature of a monopoly, cannot arbitrarily fix the price at which it will furnish light to those who desire to use it, but must give equal rates to all consumers.—*Cincinnati, H. & D. R. Co. v. Village of Bowling Green*, 57 Oh. St. 336 49 N. E. 121, 41 L. R. A. 422n.

A gas company cannot lawfully make and enforce a scale of prices which are unequal, unreasonable or extortionate, even though the common council unite with the gas company in approving such schedule.—*Toledo v. Gas Co.*, 8 Oh. Dec. 277.

One of the conditions for the exercise of the privilege of conducting a gas business, under legislative grant, is that, in the absence of legislative prescription restricting the rate of compensation for the service furnished, the grant carries by implication the obligation to furnish it at a reasonable price.—*City of Madison v. Madison Gas & Elect. Co.*, 129 Wis. 249, 108 N. W. 65.

[7] Rates within fixed maximum deemed reasonable.

Where the legislature has fixed a maximum price which may be charged for gas, such price must be deemed reasonable and hence a charge below the said maximum price must be deemed a reasonable charge.—*Brooklyn Union G. Co. v. City of New York*, 188 N. Y. 334, 81 N. E. 141, affg. s. c. 115 App. Div. (N. Y.) 69, 100 N. Y. Supp. 625.

If a gas company charges less than the maximum fixed by the legislature, a consumer, in a suit against him for gas used, cannot claim that such lower charge was excessive and introduce evidence showing that it allowed the company too large a return.—*Brooklyn Union Gas Co. v. New York*, 188 N. Y. 334, 81 N. E. 141, affg. s. c. 115 App. Div. (N. Y.) 69, 100 N. Y. Supp. 625.

[8] What facts show unjust discrimination.

It is not unreasonable to charge a less rate where large quantities of gas, electricity or water are consumed than where small quantities are used.—*Silkman v. Water Comrs.*, 152 N. Y. 327, 46 N. E. 612, affg. s. c. 71 Hun (N. Y.), 37, 24 N. Y. Supp. 806.

A rule promulgated by a gas company which fixes the price of gas furnished to consumers at 12½ cents per thousand feet when used for fuel purposes only, and at 20 cents per thousand feet when used for both fuel and illuminating purposes is an unjust discrimination against consumers using the gas both for fuel and lighting purposes.—*Richmond Nat. Gas Co. v. Clawson*, 155 Ind. 659, 58 N. E. 1049, 51 L. R. A. 744.

When a gas company charges a greater price for gas when used for lighting than when used for heating, merely on the ground that the consumer would have to pay more for a substitute for lighting than for a substitute for heating, there is an unjust discrimination.—*Bailey v. Fayette Gas-Fuel Co.*, 193 Pa. 175, 44 Atl. 251.

A discrimination based solely on the value of the service to the customer, cannot be sustained.—*Bailey v. Fayette Gas-Fuel Co.*, 193 Pa. 175, 44 Atl. 251.

[9] Meter rent and minimum charges.

A gas corporation made a rule that in view of the fact that some customers used so little gas as to make their patronage unprofitable, in such cases it would render a "minimum gas or service bill." It appeared that such minimum charge was proportioned to the size of the meters used by the customers.—*Held*, that this amounted to a charge to cover the use of the meters.—*City of Buffalo v. Buffalo Gas Co.*, 81 App. Div. (N. Y.) 505, 80 N. Y. Supp. 1093.

N. Y. Transp. Corp. L., § 69, providing that no gas corporation shall charge or collect rent on meters either directly or indirectly is a valid ex-

ercise of the police power of the state.—*City of Buffalo v. Buffalo Gas Co.*, 81 App. Div. (N. Y.) 505, 80 N. Y. Supp. 1093.

Under N. Y. Transp. Corp. L., Art. 6, § 65, which provides for the furnishing of electricity upon application but does not fix the charges to be made therefor, it is not unreasonable for an electric lighting company to compel a consumer, before lighting facilities are installed, to sign a stipulation providing for a minimum monthly charge of \$1.50.—*Gould v. Edison Elect. Ill. Co.*, 29 Misc. (N. Y.) 241, 60 N. Y. Supp. 559.

It is ordinarily the right of gas companies to charge rent for meters.—*Smith v. Capital Gas Co.*, 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 769; *State v. Sedalia Gas Co.*, 34 Mo. App. 501.

Upon the application of a former consumer of gas to have gas again supplied to him, it was proper for the gas company to charge meter rent, where the value of the gas used by such consumer during the last year he had used gas was not a sixth part of the annual expense of the meter, it not being shown that there was any unjust discrimination.—*Smith v. Capital Gas Co.*, 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 769.

Under a charter limiting the amount which could be charged for gas, a gas company cannot, in addition to that amount, charge "meter rent" against persons consuming less than a named quantity of gas per month.—*Louisville Gas Co. v. Dulaney*, 100 Ky. 405, 18 Ky. L. R. 849, 38 S. W. 703, 36 L. R. A. 125.

A contract between a municipality and a gas corporation provided that the latter would furnish gas to consumers at a rate not to exceed \$2 per thousand feet.—*Held*, that such contract precluded the company from charging meter rent in addition to the stipulated rate.—*Capital Gas & Elect. L. Co. v. Gaines*, 20 Ky. L. R. 1464, 49 S. W. 462.

A regulation by a gas company to the effect that consumers should pay a monthly rental upon, and for the use of, the meter furnished by the company, the sum of \$1.50 in cases where the consumer used less than 500 feet of gas, which sum should be in full payment for the gas consumed, is not unreasonable.—*State v. Sedalia Gas L. Co.*, 34 Mo. App. 501.

[10] Charges by municipalities.

The courts will not interfere with the rates fixed by the municipal boards in charge of a city gas plant unless there has been a discrimination which compels some patrons to pay more than others similarly situated.—*Bellaire Goblet Co. v. City of Findlay*, 5 Oh. C. C. 418.

[11] Effect of ordinances on right to charge.

A town has the right, in granting the use of its streets to a gas corporation, to impose reasonable requirements, terms and conditions, and

where in such a grant, the maximum price at which gas might be supplied was fixed, the company, after accepting such grant, will be enjoined from charging a greater amount.—*Westfield Gas & M. Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033.

Where a city passes an ordinance granting to a gas company the privilege of using its streets for pipes and imposes conditions on the company, the company, by accepting the ordinance is bound by the conditions, and the terms proposed on the one hand and accepted on the other make a valid and enforceable contract.—*City of Noblesville v. Noblesville Gas & Imp Co.*, 157 Ind. 162, 60 N. E. 1032.

The ordinance granting a gas corporation the right to lay pipes through the streets of a city, provided that in consideration of the privileges granted, the company would furnish gas to the inhabitants of the city at a price not to exceed \$3 per thousand feet. The charter of the company fixed no maximum price.—*Held*, that no power was given to perpetually charge \$3 per thousand feet.—*State ex rel. Hadden v. Cleveland Gas L. & C. Co.*, 3 Oh. C. C. 251.

Where a gas company has made contracts with its patrons as to the price of gas furnished them, and the city later reduces the lawful maximum charge, the price of gas furnished such patrons is governed by the ordinance and not by the contracts.—*Chillicothe v. Logan N. Gas & F. Co.*, 8 Oh. N. P. 88.

[12] Reasonable return on investment — Right to receive.

Right of corporation to fix price of gas as incident to powers given in charter,—see ante, § 1, note [9].

Right to charge reasonable amount implied from charter,—see ante, § 66, note [2].

The very use of the term "regulation," in connection with the prices which a private corporation may charge for the manufacture and sale of gas by it, implies that any rates so fixed by state authority shall be just and reasonable, and such as enables the company to maintain its existence, to preserve the property invested from destruction, and to receive, on the capital actually and *bona fide* invested in the plant, a remuneration or dividend corresponding in amount to the ruling rates of interest. The company has a right to such gross income from the sale of gas as will enable it to pay all legitimate operating expenses, pay interest on valid fixed charges, so far as bonds or securities represent an actual expenditure in good faith, and also to pay a reasonable dividend on stock, so far as this represents an actual investment in the enterprise.—*New Memphis Gas & L. Co. v. City of Memphis*, 76 Fed. 952.

A public service corporation is entitled to a fair return upon the actual value of its property devoted to the public use, after paying all expenses

and liabilities reasonably charged against the same.— *Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 341; revd. on other grounds, 191 N. Y. 123, 83 N. E. 693.

The legislature may not require a gas company to supply gas at a rate that will not admit of a reasonable profit to the stockholders upon the actual value of the plant and property of the company.— *Richman v. Consolidated Gas Co.*, 114 App. Div. (N. Y.) 216, 100 N. Y. Supp. 81; affd. on other points, 186 N. Y. 209, 78 N. E. 871.

Where, upon complaint of the trustees of a village as to rates charged by a company for lighting, investigation shows that the earnings of the company are insufficient to pay a reasonable return on a fair valuation of the property, no reduction in rates can fairly be made and the complaint will be dismissed.— *Village of Adams v. Adams Elect. L. Co.* Decided by the Public Service Commission for the Second District, April 16, 1908.

[13] — What constitutes reasonable return.

A fair return upon the value of the property actually used by a public service corporation, is such a return as shall be fair compensation for the risk assumed by the investor in permitting his money to remain in such an enterprise.— *Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 341; revd. on other grounds, 191 N. Y. 123, 83 N. E. 693.

The investment in a gas and electric light company is not secured as is a loan, upon abundant security. There is a greater risk of loss, and therefore the investment is entitled to a greater rate of return than an investment loan upon approved security.— *Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 341; revd. on other grounds, 191 N. Y. 123, 83 N. E. 693.

What is a fair return must depend ultimately upon the judgment of the court.— *Village of Saratoga v. Saratoga Gas, E. L. & Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 341; revd. on other grounds, 191 N. Y. 123, 83 N. E. 693.

Stockholders of a public service corporation are not entitled to require the public to pay dividends upon fictitious stock or for their extravagance or waste.— *Village of Saratoga v. Saratoga Gas, E. L. & P. Co.*, 122 App. Div. (N. Y.) 203, 107 N. Y. Supp. 341; revd. on other grounds, 191 N. Y. 123, 83 N. E. 693.

A rate is reasonable which yields a fair return from the investment after payment of operating expenses and fixed charges.— *Brymer v. Butler Water Co.*, 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260.

[14] — Determination by court.

The reasonableness of rates fixed by municipal ordinance as maximum rates for gas companies is a matter for judicial determination and review.—*Capital City Gas Co. v. City of Des Moines*, 72 Fed. 818.

It is for the courts to determine whether rates and regulations prescribed under legislative authority are reasonable and proper.—*City of Madison v. Madison Gas & Elect. Co.*, 129 Wis. 249, 108 N. W. 65.

[15] — Rates fixed by state or city presumed reasonable.

The state has the right to fix a proper rate for gas. *Prima facie* it is to be presumed that the state's rate is a proper one, and the burden is on the complainant to show it is not.—*Consolidated Gas Co. v. Mayer*, 146 Fed. 150.

Where under a contract between a city and a gas company the former has the power to fix rates, such rates are conclusive upon the company, unless fraud or bad faith be proved.—*Logansport & W. Va. Gas Co. v. Peru*, 89 Fed. 185.

[16] Matters to be considered in determining as to reasonableness of charges.

Under the authorities, in fixing the rate to be charged for "public service" by private corporations, two elements of calculation are of fundamental importance: (1) What is the true, present value of the property embarked in the enterprise? (2) What, in view of the risks of the business, is a fair annual percentage of return thereon? The N. Y. Gas and Electricity Commission reached the decision that 8 per cent. was a proper return on property invested in the gas business. The court declared as dictum that the Commission erred in ruling that the franchises of the company should be considered as of no value at all, in determining the amount and value of property on which return should be calculated. That the franchises were given to the company by the people without compensation does not justify the course of the Commission, especially as in taxing these franchises, another state commission values them at several million dollars and requires the company to pay taxes on such valuation.—*Consolidated Gas Co. v. Mayer*, 146 Fed. 150.

A gas franchise was given for 20 years, with power in the city council after 10 years to fix the price to be charged.—*Held*, that at the expiration of the 10 years, in determining what would be a reasonable rate, the council may take into consideration the earnings in the past.—*Logansport & W. Va. Gas Co. v. Peru*, 89 Fed. 185.

In determining the value of the plant of a gas corporation, the cost of reproduction at the time of inquiry is the first and most important figure to be ascertained.—*Consolidated Gas Co. v. City of New York*, 157 Fed. 849.

The present value of the property of a gas corporation is the proper basis for determining whether a rate yields a reasonable return.—*Consolidated Gas Co. v. City of New York*, 157 Fed. 849.

The question what is a reasonable return on the investment of a gas corporation is largely local, and decisions from one part of the country may be of small value in another where conditions of business life are different.—*Consolidated Gas Co. v. City of New York*, 157 Fed. 849.

The legal rate of interest in a state has little weight in determining what is a reasonable return on the investment of a gas corporation.—*Consolidated Gas Co. v. City of New York*, 157 Fed. 849.

Where a gas corporation has the monopoly of furnishing gas to the inhabitants of a city, there is no "good will" apart from its franchises upon which it is entitled to earn a return.—*Consolidated Gas Co. v. City of New York*, 157 Fed. 849.

Discussion of what per cent. a gas company is entitled to receive on its investment.—*Consolidated Gas Co. v. City of New York*, 157 Fed. 849.

Where a gas corporation organizes a company for the purpose of carting the coke made at said corporation's various plants, the amount so invested is not properly regarded as part of the corporation's capital on which it is entitled to a return.—*Consolidated Gas Co. v. City of New York*, 157 Fed. 849.

Property occupied by a gas corporation under a claim of title and used by it in its business may be included in its assets, even though title is not clearly established.—*Report of Master Arthur H. Masten to Judge Lacombe in Consolidated Gas Co. v. Mayer*.

Property of a gas corporation not necessary or likely to be used for any purpose of the company in connection with its business cannot be considered as an asset.—*Report of Master Arthur H. Masten to Judge Lacombe in Consolidated Gas. v. Mayer*.

The mere description of a parcel of land owned by a gas corporation as "unimproved" or "vacant" in an assessment roll is not sufficient foundation for the conclusion that the property is not used by the corporation in its gas-making business.—*Report of Master Arthur H. Masten to Judge Lacombe in Consolidated Gas Co. v. Mayer*.

Interest on sums used in the construction of a gas plant covering the period of construction is properly included as part of the cost of construction.—*Report of Master Arthur H. Masten to Judge Lacombe in Consolidated Gas Co. v. Mayer*.

The power to fix maximum prices of gas must be exercised in good faith, and the *bona fides* of the regulating body may be inquired into.—*State ex rel. Attorney General v. Cincinnati Gas L. & C. Co.*, 18 Oh. St. 262.

In the furnishing of electricity to a country or suburban district, each customer is to a greater or less degree differently situated from his neighbor. The distance from the main or feed line, the number of lights used, the means of access, whether along a public way or over private property, the natural obstacles to be overcome, etc., are proper subjects for consideration in determining the rate to be charged.—*Mercur v. Electric Light Co.*, 19 Pa. Super. Ct. 519.

[17] Recovery of excess paid.

Money paid by consumers of gas in excess of the rate which could be lawfully charged, the consumers being ignorant of the fact that the charge was illegal, may be recovered.—*Pingree v. Mutual Gas Co.*, 107 Mich. 156, 65 N. W. 6.

[18] Effect of failure of patron to pay.

Under N. Y. Transp. Corp. L., § 68, a gas and electric company may cut off the supply of gas to a patron who fails to pay, even before the security deposited by such patron is used up.—*Hewsey v. Queens Borough Gas & Elect. Co.*, 47 Misc. (N. Y.) 375, 93 N. Y. Supp. 1114.

Where a person has made separate contracts with a gas company, involving the use of separate meters, pipes, etc., his failure to pay, in relation to one such contract, does not warrant shutting off the supply of gas as to the others.—*Baltimore Gas. L. Co. v. Colliday*, 25 Md. 1.

[19] Actions and proceedings.

An injunction temporarily restraining officers charged with duty of enforcing rates fixed by statute for gas, pending determination of the constitutionality of such rates, will not be enlarged to restrain the actions of individual consumers who are not parties to the suit.—*Consolidated Gas Co. v. Mayer*, 146 Fed. 150.

Where the legislature imposes a ruinous penalty for charges in excess of a maximum fixed by it, and the gas company proposes to test in the courts the lawfulness of such maximum rates, a preliminary injunction will be granted to restrain the attempted enforcement of such maximum or collection of penalties for charges in excess thereof, all sums collected by the company in excess of such maximum to be impounded in the custody of the court until the lawfulness of the legislative action is determined.—*Consolidated Gas Co. v. Mayer*, 146 Fed. 150.

A complaint alleging that the defendant corporation furnishing electricity to plaintiff, unlawfully and unjustly discriminated against him by charging other persons a less rate for the same service under similar conditions, and that the payments made by the plaintiff were made without notice or knowledge that others were receiving more advantageous

rates, states a good cause of action, for recovery of the excess paid.—*Armour Packing Co. v. Edison E. L. Co.*, 115 App. Div. (N. Y.) 51, 100 N. Y. Supp. 605.

A corporation may at any time have recourse to the state or federal courts to test the validity of an enactment of the legislature prescribing or regulating the rates to be charged for gas, upon the ground that it is so low that it will deprive the stockholders of the right to a reasonable profit.—*Richman v. Consolidated Gas Co.*, 114 App. Div. (N. Y.) 216, 100 N. Y. Supp. 81; *affd.* on other points, 186 N. Y. 209, 78 N. E. 871; *Grossman v. Consolidated Gas. Co.*, 114 App. Div. 242; *affd.* 186 N. Y. 541, 78 N. E. 1104.

Where the state has empowered a city council to fix the maximum prices of gas, the council has fixed a maximum, and a federal court has enjoined the company from charging or the city from enforcing such rates, the state may, nevertheless, assert the validity of the limitation, and sue to enforce it.—*State ex rel. Attorney General v. Cincinnati L. & C. Co.*, 18 Oh. St. 262.

§ 73. Forfeiture for noncompliance with order; **[actions to recover forfeiture]*.—Every gas corporation and electrical corporation and the officers, agents or employees thereof shall obey, observe and comply with every order made by the commission under authority of this act, so long as the same shall be and remain in force. Any such corporation, or any officer, agent or employee thereof, who knowingly fails or neglects to obey or comply with such order, or any provision of this act, shall forfeit to the state of New York not to exceed the sum of one thousand dollars for each offense. Every distinct violation of any such order or of this act, shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. An action to recover such forfeiture may be brought in any court of competent jurisdiction in this state in the name of the people of the state of New York, and shall be commenced and prosecuted to final judgment by counsel to the commission. In any such action all penalties and forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be, or be held to be, a waiver of the right to recover any other penalty or forfeiture; if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order of

*Words in brackets not a part of section heading as enacted.—Ed.

the commission the defendant was actually and in good faith prosecuting the suit, action or proceeding in the courts to set aside such order, the court shall remit the penalties or forfeitures incurred during the pendency of such suit, action or proceeding. All moneys recovered in any such action, together with the costs thereof, shall be paid into the state treasury to the credit of the general fund.

General power of the state to regulate property devoted to public use,— see ante, § 1, notes [1]–[22].

General rules of statutory construction,— see ante, § 1, notes [23]–[40].

What statutes construed as penal,— see ante, § 1, note [35].

Construction of statutes containing penal provisions,— see ante, § 1, notes [36], [37].

Validity of commission plan or regulation,— see ante, § 4, note [14].

Actions by aggrieved persons for loss or damage caused by violations of this Act,— see ante, § 40.

Forfeiture for non-compliance with orders of the Commission by common carriers,— see ante, § 56.

Proceedings to recover penalties and forfeitures against common carriers,— see ante, § 59.

L. 1906, ch. 125, limited the prices which might be charged for gas in Manhattan Borough, and provided that any corporation or person violating the act should forfeit \$1,000 for each offense.—*Held*, that this penalty was so ruinous as to entitle company to an injunction restraining the attempt to enforce these provisions until the constitutionality of the rates had been determined; all charges collected, however, in excess of those fixed by the law to be impounded to await the outcome of the suit as to constitutionality.—*Consolidated Gas Co. v. Mayer*, 146 Fed. 150.

§ 74. Summary proceedings* [to enforce orders of commissions].— Whenever either commission shall be of opinion that a gas corporation, electrical corporation or municipality within its jurisdiction is failing or omitting or about to fail or omit to do any thing required of it by law or by order of the commission or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceed-

* Words in brackets are not a part of section heading as enacted.—Ed.

ing in the supreme court of the state of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time not exceeding twenty days after service of a copy of the petition within which the gas corporation, electrical corporation or municipality complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations, as it shall seem to the court necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief.

Enforcement of orders of former Gas and Electricity Commission,—
see N. Y. Gas & El. Com. Act, § 20.

Duties of counsel to the Commission on proceedings to enforce its orders,—see ante, § 12.

Limitation of grounds upon which courts may interfere with the enforcement of orders of the Commission,—see ante, § 23.

Summary proceedings to enforce orders of Commission against common carriers,—see ante, § 57.

General rules of statutory construction,—see ante, § 1, notes [23]—[40].

The state has the right to fix a proper rate for gas. *Prima facie* it is to be presumed that the state's rate is a proper one, and the burden is on the complainant to show it is not.—*Consolidated Gas Co. v. Mayer*, 146 Fed. 150.

Neither the N. Y. Gas and Electricity Commission Act nor L. 1906, ch. 125, undertake to deny the complainant gas company access to any

court to test the merit of the contention that it makes, viz., that the new rate is confiscatory.—*Consolidated Gas Co. v. Mayer*, 146 Fed. 150.

Mandamus will lie to compel a gas company to furnish gas to those who have a right to receive it and who offer to comply with the reasonable general conditions imposed by the company.—*People v. Manhattan Gas Co.*, 45 Barb. (N. Y.) 136.

Mandamus is the proper remedy to compel a gas company to furnish gas to one entitled thereto.—*State ex rel. Wood v. Consumers Gas T. Co.*, 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245.

Mandamus is the proper proceeding by which to compel a gas company to furnish gas to those entitled to receive it.—*Portland Natural Gas & O. Co. v. State*, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639.

Duties of corporations arising out of contract relations will not be enforced by mandamus.—*Commonwealth ex rel. Stern v. Wilkesbarre Gas Co.*, 2 Kulp (Pa.), 499.

Equity has jurisdiction to restrain a gas corporation from demanding and collecting excessive or unreasonable rates.—*City of Madison v. Madison Gas & Elect. Co.*, 129 Wis. 249, 108 N. W. 65.

§ 75. Defense in case of excessive charges for gas or electricity.—If it be alleged and established in an action brought in any court for the collection of any charge for gas or electricity, that a price has been demanded in excess of that fixed by the commission or by statute in the municipality wherein the action arose, no recovery shall be had therein, but the fact that such excessive charges have been made shall be a complete defense to such action.

Similar provision in New York Gas and Electricity Commission Act,
— see N. Y. Gas & El. Com. Act, § 21.

Powers of Commission to fix prices for gas and electricity,— see ante, § 72.

General rules of statutory construction,— see ante, § 1, notes [23]–[40].

The passage of a law taking away defenses to civil actions based on rules of law which are purely arbitrary is not a deprivation of property without due process of law.—*Plummer v. No. Pac. R. Co.*, 152 Fed. 206.

The New York Gas and Electricity Commission Act provided that if it shall be established in any action to collect a charge for gas that a price had been demanded in excess of that fixed by the commission or by statute such excessive charge should be a complete defense to the action.—*Held*, that this penalty was so drastic as to entitle a gas company to an injunction restraining the attempted enforcement of a rate fixed by statute, until such rate had been judicially declared constitutional; all charges collected, however, in excess of those fixed by the statute to be impounded to await the outcome of the suit as to the lawfulness of the rate prescribed by the legislature.—*Consolidated Gas Co. v. Mayer*, 146 Fed. 150.

§ 76. Jurisdiction.—Whenever any corporation supplies gas or electricity to consumers in both districts, any application or report to a commission required by this act shall be made to the commission of the district within which it is mainly supplying, or proposing to supply, such service to consumers. But nothing herein contained shall be construed to deprive the commission of either district of the power of supervision and regulation within its district. And either commission shall have power to enter and inspect the plant of such corporation, wherever situated.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Territorial jurisdiction of the commissions, generally,—see ante, § 5.

§ 77. Powers of local officers.—If in any city of the first or second class there now exists or shall hereafter be created a board, body or officer having jurisdiction of matters pertaining to gas or electric service, such board, body or officer shall have and may exercise such power, jurisdiction and authority in enforcing the laws of the state and the orders, rules and regulations of the commission as may be prescribed by statute or by the commission.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

ARTICLE V.

Commissions and Offices Abolished; Saving Clause; Repeal.

SECTION 80. Board of railroad commissioners abolished; effect thereof.

81. Commission of gas and electricity abolished; effect thereof.

82. Inspector of gas meters abolished; effect thereof.

83. Board of rapid transit railroad commissioners abolished; effect thereof.

84. Transfer of records.

85. Pending actions and proceedings.

86. Construction.

87. Repeal.

88. Appropriation.

89. Time of taking effect.

§ 80. Board of railroad commissioners abolished; effect thereof.—On and after the taking effect of this act the board of railroad commissioners shall be abolished. All the powers and duties of such board conferred and imposed by any statute of this state shall thereupon be exercised and performed by the public service commissions.

For powers and duties of former Board of Railroad Commissioners,—see N. Y. R. R. L.

Effect of abolition of Board on pending actions and proceedings,—see post, § 85.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Decisions of former Board of Railroad Commissioners merely advisory, see ante, § 23, note [1].

Determinations of former Board of Railroad Commissioners not enforceable,—see ante, § 57, note [1].

The proceedings of the N. Y. Board of Railroad Commissioners, under N. Y. R. R. L., § 34, in granting the application of a railroad to discontinue a station, are subject to review by certiorari.—*People ex rel. Loughran v. Board of R. R. Comrs.*, 158 N. Y. 421, 53 N. E. 163, affg. s. c. 32 App. Div. (N. Y.) 158, 52 N. Y. Supp. 901.

The state may make the Railroad Commissioner's certificate conclusive evidence of the non-existence of any sufficient ground of forfeiture of the charter of a railroad corporation.—*People v. Ulster & D. R. Co.*, 128 N. Y. 240, 28 N. E. 635.

The General Railroad Act does not authorize a corporation formed under it to build an elevated railroad in city streets without complying with the provisions of the city charter with reference to the building of such structures.—*Schaper v. Brooklyn & L. I. R. Co.*, 124 N. Y. 630, 26 N. E. 311.

A railroad seeking to acquire lands by condemnation must show, first, a legislative warrant, and second, if the right is challenged, that the particular scheme on which it is engaged is a railroad enterprise within the true meaning of that term, so that the acquiring of lands for it would be a taking thereof for a public use.—*Matter of Niagara Falls & W. R. Co.*, 108 N. Y. 375, 15 N. E. 429, affg. 46 Hun (N. Y.), 94.

§ 81. Commission of gas and electricity abolished; effect thereof.—On and after the taking effect of this act the commission of gas and electricity shall be abolished. All the powers and duties of such commission conferred and imposed by any statute of this state shall be exercised and performed by the public service commissions.

For powers and duties of former Gas and Electricity Commission,—
see N. Y. Gas & El. Com. Act (Laws 1905, Ch. 737).

Effect of abolition of Commission of Gas and Electricity on pending actions and proceedings,—see post, § 85.

General rules of statutory construction,—see ante, § 1, notes [23]—[40].

§ 82. Inspector of gas meters abolished; effect thereof * [on meters already inspected].—On and after the taking effect of this act the offices of inspector and deputy inspectors of gas meters shall be abolished. All the powers and duties of such inspector conferred and imposed by any statute of this state shall be exercised and performed by the public service commissions. But any meter inspected, proved and sealed, by the said inspector of gas meters, prior to the taking effect of this act, shall be deemed to have been inspected by the commission.

* Words in brackets are not a part of section heading as enacted.—ED.

For acts creating offices abolished by this section,—see N. Y. Transp. Corp. L., §§ 62–64.

Inspection of gas meters under the direction of the Commissions,—see ante, § 67.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

§ 83. Board of rapid transit railroad commissioners abolished; effect thereof.—On and after the taking effect of this act the board of rapid transit railroad commissioners shall be abolished. All the powers and duties of such board conferred and imposed by any statute of this state shall thereupon be exercised and performed by the public service commission of the first district.

Powers and duties of former Board of Rapid Transit Railroad Commissioners transferred to the Public Service Commission of the First District by §§ 5 and 83 of the Public Service Commissions Law,—see N. Y. Rap. Tr. Act, §§ 4, 7, 14, 28, 32, 32a, 34, 34a–e, 65; L. 1894, ch. 752, §§ 12, 13; L. 1906, ch. 108, §§ 1–9, ch. 472, §§ 12, 14, post, Appendix A.

Powers and duties of Board of Rapid Transit Railroad Commissioners transferred to the Public Service Commission of the First District,—see also ante, § 5.

Effect of abolition of Board on pending actions and proceedings,—see post, § 85.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

Power of state to resume or transfer local functions,—see ante, § 5, note [5].

[1] Validity of Rapid Transit Acts.

The Rapid Transit Act of 1894 is constitutional.—*Sun Publishing Assn. v. Mayor*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788, affg. s. c. 8 App. Div. (N. Y.) 230, 40 N. Y. Supp. 607.

The N. Y. Rapid Transit Act of 1875 is not open to the constitutional objection that it delegates legislative powers to the Board of Rapid Transit Commissioners.—*Matter of Gilbert El. R. Co.*, 70 N. Y. 361, 3 Abb. N. C. (N. Y.) 434, affg. 9 Hun (N. Y.), 303.

The N. Y. Rapid Transit Act of 1875 is not unconstitutional as a private or local bill "granting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever."—*Matter of Gilbert El. R. Co.*, 70 N. Y. 361, 3 Abb. N. C. (N. Y.) 434, affg. 9 Hun (N. Y.), 303.

The Rapid Transit Act of 1875 is constitutional.—*Matter of N. Y. El. R. Co.*, 70 N. Y. 327; distinguished, 104 N. Y. 41, 111 N. Y. 106, limited, 7 N. Y. Crim. 350, 7 N. Y. Supp. 149.

[2] Powers of former Board of Rapid Transit Railroad Commissioners.

The intent of the legislature in enacting the N. Y. Rapid Transit Act was to confer upon the Board of Rapid Transit Railroad Commissioners all the powers necessary to properly construct the railroads therein provided for, without the concurrent action of the ordinary municipal authorities, except where such action was specifically required by the Act.—*Rapid Transit Subway Const. Co. v. Coler*, 121 App. Div. (N. Y.) 250.

The N. Y. Board of Rapid Transit Railroad Commissioners had power to authorize a sub-contractor engaged in constructing a subway, to occupy such portion of streets crossed by the proposed work as was necessary in the prosecution of the undertaking.—*Rapid Transit Subway Const. Co. v. Coler*, 121 App. Div. (N. Y.) 250.

Although the N. Y. Rap. Tr. Act, § 63, provides that the subway shall be deemed to be a part of the public streets and highways of the city of New York, the control thereof is vested in the Board of Rapid Transit Commissioners.—*Interborough R. T. Co. v. City of N. Y.*, 47 Misc. (N. Y.) 221, 95 N. Y. Supp. 886.

[3] Reports.

Where a court has imposed conditions upon which a report of the Board of Rapid Transit Commissioners of New York City will be confirmed, and the conditions have not been complied with, the result will be the denial of an application to confirm the report.—*Matter of Board of Rapid Transit Comrs.*, 119 App. Div. (N. Y.) 196, 104 N. Y. Supp. 671.

On an application to approve the report of the N. Y. Board of Rapid Transit Railroad Commissioners authorizing a change of the route of the subway under Park avenue, in New York city, the city should be made a formal party, the city to have leave to move to open the proceeding and come in.—*Matter of Board of Rapid Transit Comrs.*, 119 App. Div. (N. Y.) 196, 104 N. Y. Supp. 671.

Where the cost of a proposed railway is uncertain and is not even estimated approximately, and the probabilities are that it may exceed the

bonded debt limit of the city, the court will not grant the motion of the N. Y. Board of Rapid Transit Railroad Commissioners for a confirmation of a report favorable to the construction of such railway.—*Matter of Rapid Transit Railroad Comrs.*, 5 App. Div. (N. Y.) 290, 39 N. Y. Supp. 750.

[4] Local officers.

The members of the Board of Rapid Transit Railroad Commissioners are local or city officers.—*Sun Publishing Assn. v. Mayor*, 8 App. Div. (N. Y.) 230, 40 N. Y. Supp. 607; *affd.* 152 N. Y. 257, 46 N. E. 499.

[5] "City purposes."

See also, ante, § 14, note [2].

Construction, management and control of rapid transit railways by the municipality is a "city purpose."—*Sun Publishing Assn. v. Mayor*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788, *affg. s. c.* 8 App. Div. (N. Y.) 230, 40 N. Y. Supp. 607.

[6] Distribution of powers of local government.

Power of state to resume and transfer powers previously conferred on local officers.—*see ante*, § 5, note [5].

In distributing the powers of local government, the legislature may act as it may deem best. What it could have done originally, it could do by subsequent enactment.—*People ex rel. Taylor v. Dunlap*, 66 N. Y. 162; *Matter of Allison v. Welde*, 172 N. Y. 421, 65 N. E. 263.

[7] Abolishment of offices.

The legislature may abolish a city office as unnecessary unless it is a constitutional office; and even if some of the functions of the office are necessary for the welfare of the municipality, these functions may be devolved upon other city officers.—*Matter of Allison v. Welde*, 172 N. Y. 421, 65 N. E. 263.

There is no vested right in an office which may not be disturbed by legislative enactment.—*People ex rel. Ryan v. Green*, 58 N. Y. 295.

The legislative body creating an office may abolish it, ending the tenure of the existing incumbent before the expiration of the time for which he was appointed.—*City Council v. Sweeney*, 44 Ga. 463.

[8] Rights granted by subway lease.

The lease by The City of New York of the subway does not give the right to the lessee to use the ducts, which were constructed in connection with said subway, for the transmission of electricity for the use of third parties.—*City of N. Y. v. Interborough R. T. Co.*, 55 Misc. (N. Y.) 138, 106 N. Y. Supp. 296.

The lease of the New York Subway to J. B. McDonald carried with it the right to maintain automatic weighing and vending machines in the subway stations so long as such machines in no way interfere with the use by the public of the railroad or deprive the public of any right to which it is entitled.—*City of New York v. Interborough R. T. Co.*, 53 Misc. (N. Y.) 126, 104 N. Y. Supp. 157.

[9] Railroads organized under Act of 1875.

A railroad corporation formed under the N. Y. Rapid Transit Act, of 1875, acquires by the act of incorporation and upon obtaining the necessary consents of the public authorities and the property-holders, an indefeasible right to construct its road upon the routes designated in its articles of incorporation.—*Suburban R. Co. v. Mayor*, 128 N. Y. 510, 28 N. E. 525.

Street surface railways cannot be organized under the N. Y. Rapid Transit Act of 1875.—*New York Cable Co. v. Mayor*, 104 N. Y. 1, 10 N. E. 332.

§ 84. Transfer of records; *[retaining of employees].—1. The board of railroad commissioners, the commission of gas and electricity, and the inspector of gas meters, shall transfer and deliver to the public service commission of the second district all books, maps, papers and records of whatever description, now in their possession; and upon taking effect of this act, the said commission is authorized to take possession of all such books, maps, papers and records.

2. The board of rapid transit railroad commissioners shall transfer and deliver to the public service commission of the first district all contracts, books, maps, plans, papers and records of whatever description, now in their possession; and upon taking effect of this act, the said commission is authorized to take possession of all such contracts, books, maps, plans, papers and records. The said commission may also, at its pleasure, retain in its employment any person or persons now employed by the said board of rapid transit railroad commissioners, and all said persons shall be eligible for transfer and appointment to positions under the public service commission of the first district.

Proceedings by which a public officer may obtain possession of books and papers belonging to his office,—see N. Y. Code Civ. Pro., § 2471a.

*Words in brackets not a part of section heading as enacted.—Ed.

General power of Commission to employ subordinate officers,—see ante, § 8.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

A certificate of appointment to a public office does not establish a *prima facie* right to the books and papers pertaining thereto.—*Matter of Brenner*, 170 N. Y. 185, 63 N. E. 133.

“Subdivision 2 of section 84 [of the Public Service Commissions Law] provides that the Commission may retain in its employment any person or persons now employed by the Board of Rapid Transit Railroad Commissioners and all said persons shall be eligible for transfer and appointment to positions under the Public Service Commission of the First District. As to the future employees of the Commission, they are under the jurisdiction of the State Civil Service Commission and an application should be made to that body for authority to make appointments.”—*Opinion of Corporation Counsel F. K. Pendleton*, rendered to Comptroller H. A. Metz, July 13, 1907.

“Subdivision 2 of section 84 [of the Public Service Commissions Law] provides that all contracts of the Board of Rapid Transit Railroad Commissioners shall be transferred and delivered to the new Commission. I am of the opinion that this is broad enough to include the lease of the premises occupied by the Board.”—*Opinion of Corporation Counsel F. K. Pendleton*, rendered to Comptroller H. A. Metz, July 13, 1907.

§ 85. Pending actions and proceedings.—This act shall not affect pending actions or proceedings, civil or criminal, brought by or against the board of railroad commissioners or the commission of gas and electricity, or the board of rapid transit railroad commissioners, but the same may be prosecuted or defended in the name of the public service commission, provided the subject-matter thereof is within the statutory jurisdiction of such commission. Any investigation, examination or proceeding undertaken, commenced or instituted by the said boards or commission or either of them prior to the taking effect of this act may be conducted and continued to a final determination by the proper public service commission in the same manner under the same terms and conditions, and with the same effect as though such boards or commission had not been abolished.

General rules of statutory construction,—see ante, § 1, notes [23]–[40].

§ 86. Construction; *[this act shall not be deemed to apply to interstate commerce].—Wherever the terms board of railroad commissioners, or commission of gas and electricity or inspector of gas meters or board of rapid transit railroad commissioners occur in any law, contract or document or whenever in any law, contract or document reference is made to such boards, commission or inspector, such terms or references shall be deemed to refer to and include the public service commissions as established by this act, so far as such law, contract or document pertains to matters which are within the jurisdiction of the said public service commissions. Nothing in this act contained shall be deemed to apply to or operate upon interstate or foreign commerce.

General rules of statutory construction,—see ante § 1, notes [23]—[40].

§ 87. Repeal.—The following acts and parts of acts, together with all other acts amendatory of such acts, and all acts and parts of acts otherwise in conflict with this act, are hereby repealed;

Laws of 1905, chapter 737.

Laws of 1905, chapter 728.

Laws of 1904, chapter 158.

Laws of 1902, chapter 373.

Laws of 1896, chapter 456.

Laws of 1894, chapter 452.

Laws of 1892, chapter 534.

Laws of 1891, chapter 4, sections 1, 2 and 3.

Laws of 1890, chapter 565, sections 150 to 172 inclusive.

Laws of 1890, chapter 566, sections 62, 63 and 64.

Provisions of N. Y. Statutory Construction Law relative to effect of subsequent re-enaction,—see N. Y. Statutory Construction Law, § 32.

General rules of statutory construction,—see ante, § 1, notes [23]—[40].

Repeal by implication,—see also, ante, § 1, note [38].

*Words in brackets not a part of section heading as enacted.—Ed.

While repeals by implication are not favored, a statute will be construed as taking away a right existing prior thereto if it is found that such pre-existing right is so repugnant to the statute that the survival of such a right would in effect deprive the subsequent statute of its efficacy.—*Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. R. (U. S.) 350, revg. s. c. 12 Tex. Ct. R. 498, 85 S. W. 1052.

A statute covering the whole subject matter of a former one, adding offenses, varying the procedure, etc., operates not cumulatively but by way of substitution, and therefore impliedly repeals it. In the absence of any repealing clause, however, it is necessary to the implication of a repeal that the objects of the two statutes are the same. If they are not, both statutes will stand, though they refer to the same subject.—*U. S. v. Claffin*, 97 U. S. 546, affg. s. c. Fed. Cases No. 14,799.

To establish a supersession or repeal of a statute by implication, it is not sufficient to show merely that a later statute, making no mention of the particular subject of the first, employs language broad enough to cover some part or all of it for, as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes cannot stand together, reasonable purpose and operation being accorded to each. Particularly is this true if the first expresses a settled policy in legislation.—*Great Northern R. Co. v. U. S.*, 155 Fed. 945.

The repealing clause in the Hepburn Act, "all laws and parts of laws in conflict with the provisions of this act are hereby repealed," expresses the extent to which it has been intended to repeal prior laws, and excludes any implication of a more extended repeal.—*Great Northern R. Co. v. U. S.*, 155 Fed. 945.

Where two statutes relate to the same subject matter, though not in terms repugnant and inconsistent, if the latter one is plainly intended to prescribe the only rule that shall govern, it will repeal the earlier one.—*Matter of N. Y. Institution*, 121 N. Y. 234, 24 N. E. 578.

Where a revising statute covers the whole subject matter of antecedent statutes, the revising statute virtually repeals the former enactments without any express provision to that effect, and even where some parts of the revised statute are omitted in the new law, they are not in general to be regarded as left in operation, but are considered as annulled, if it appear that the legislature intended to cover the whole subject matter by the new statute.—*Matter of N. Y. Institution*, 121 N. Y. 234, 24 N. E. 578, *Heckman v. Pinckney*, 81 N. Y. 211.

Where two statutes relate to the same subject matter, though not in terms repugnant and inconsistent, if the latter one is plainly intended to prescribe the only rules that shall govern, it will repeal the earlier one.—*Matter of N. Y. Institution*, 121 N. Y. 234, 24 N. E. 378.

While repeals by implication are not favored, yet where the provisions of the later statute cannot have their full force and effect without the repeal of the former statute, such former statute must be deemed to be repealed by implication. Where the provisions are inconsistent the latter must prevail as the latest exhibition of the will of the law making power.—*Matter of Washington St. A. & Pk. R. Co.*, 115 N. Y. 442, 22 N. E. 356.

A repeal of statutes by implication is not favored in the law, and when both the later and former statute can stand together, both will stand unless the former is expressly repealed, or the legislative intent to repeal it is very manifest.—*People ex rel. Kingsland v. Palmer*, 52 N. Y. 83.

The repeal of a statute declaring a common law obligation of a carrier does not relieve it of liability for failure to perform its common law obligation.—*Cartwright v. Rome, W. & O. R. Co.*, 85 Hun (N. Y.), 517, 33 N. Y. Supp. 147.

A cause of action or defense, conferred by a statute based on grounds of public policy, confers no vested right which is not taken away by a repeal of the statute.—*Washburn v. Franklin*, 35 Barb. (N. Y.) 599.

§ 88. Appropriation.—There shall be appropriated for the use of the commissions, and for the payment of salaries and disbursements under this act, from money not otherwise appropriated, the sum of three hundred thousand dollars, one hundred and fifty thousand dollars for the use of the commission of the first district and one hundred and fifty thousand dollars for the use of the commission of the second district.

Mode of payment of expenses of Commissions.—see ante, § 14.

General rules of statutory construction.—see ante, § 1, notes [23]—[40].

§ 89. Time of taking effect.—This act shall take effect July first, nineteen hundred and seven.

RULES OF PRACTICE

BEFORE THE

NEW YORK PUBLIC SERVICE COMMISSIONS.

Adopted and prescribed pursuant to section 20 of the Public Service
Commissions Law.

RULES OF THE COMMISSION FOR THE FIRST DISTRICT.

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RULES OF THE COMMISSION FOR THE FIRST DISTRICT.

RULE I.

Sessions of the Commission.—Sessions of the Commission for the consideration of matters arising under chapter 4 of the Laws of 1891 as amended (the Rapid Transit Act), will be held each week on Friday at 10.30 A. M.

Sessions for hearing contested matters, or matters involving the taking of testimony, arising under the provisions of chapter 429 of the Laws of 1907 (the Public Service Commissions Law) will be held on such days and at such hours as the Commission may designate.

Sessions for receiving, considering and acting upon petitions, applications and other communications, and also for considering and acting upon any business of the Commission, other than the hearing of matters set forth above will be held at its office at 10.30 A. M. and 2 P. M., daily.

Sessions for the investigation of accidents resulting in loss of life, or injury to persons or property, and which in the judgment of the Commission shall require investigation, may be held at any time and place.

RULE II.

Address of the Commission.—All applications, complaints, petitions or answers in any proceeding, or applications or communications in relation thereto, or other communications or letters or telegrams, must be addressed to the Commission at No. 154 Nassau Street, Borough of Manhattan, New York City, unless otherwise specially directed.

RULE III.

Information to parties.—The Secretary to the Commission will, upon request, advise any party as to the form of petition, answer, or other paper necessary to be filed in any case, and furnish such information from the files of the Commission as will conduce to a full presentation of facts material to a controversy.

RULE IV.

Report of accidents.—Every common carrier, railroad corporation and street railroad corporation is required to give immediate notice to the Commission of every accident happening upon any line of railroad or street railroad owned, operated, controlled or leased by it, within the territory of the First District, by telephone or telegraph, and by written communication as set forth in an order issued by this Commission and served upon such corporation.

RULE V.

Parties to cases.—Any person or corporation aggrieved may enter a complaint with the Commission by petition or complaint, in writing, as to any matter within the jurisdiction of the Commission.

The Commission may itself institute an investigation or inquiry.

RULE VI.

Complaints.—1. The Commission may, or will, on its own motion, investigate or make inquiry, in a manner to be determined by it, in accordance with section 48, subdivision 1, of the Act.

2. Complaints made pursuant to section 48 of the Act by any person or corporation, must be by petition or complaint in writing, setting forth briefly the facts claimed to constitute a violation of the Act. The name of the person or corporation complained against should be stated in full, and the address of the petitioner, or complainant, with the name and address of his attorney or counsel, if any, must appear upon the petition or complaint.

3. Complaints, to secure investigation by the Commission, against gas or electric corporations as to the illuminating power, purity, pressure or price of gas, or the initial efficiency of the electric incandescent lamp supply, or the regulation of the voltage of the supply system used for incandescent lighting or price of electricity sold and delivered, must be made under the provisions of section 71 of the Act by the Mayor of New York City, or by complaint in writing by not less than one hundred customers or purchasers of gas or electricity.

RULE VII.

Service of complaint.—The Commission will cause a copy of a complaint to be forwarded to the person or corporation complained of, accompanied by an order, directed to such person or corporation, requiring that the matters complained of be satisfied, or that the charges be answered in writing within a time to be specified by the Commission.

RULE VIII.

Answers.—A person or corporation complained against must answer within ten days from the date of the order above provided for, but the Commission may, in a particular case, require the answer to be filed within a shorter time.

The original answer must be filed with the Secretary of the Commission at its office, and a copy thereof at the same time served, personally or by mail, upon the complainant, who must forthwith notify the Secretary of its receipt. The answer must specifically admit or deny the material allegations of the petition, and also set forth the facts which will be relied upon to support any such denial.

If a person or corporation complained against shall make satisfaction

before answering, a written acknowledgment thereof, showing the character and extent of the satisfaction given, must be filed by the complainant, and in that case the fact and manner of satisfaction, without other matter, may be set forth in the answer. If satisfaction be made after the filing and service of an answer, such written acknowledgment must also be filed by the complainant, and a supplemental answer setting forth the fact and manner of satisfaction must be filed by the person or corporation complained against.

RULE IX.

Service of papers.—Copies of notices or other papers must be served upon the adverse party or parties, personally or by mail; and when any party has appeared by attorney, service upon such attorney shall be deemed proper service upon the party.

RULE X.

Amendments.—Upon application of any party, amendment to any petition or answer in any proceeding or investigation, may be allowed by the Commission in its discretion.

RULE XI.

Adjournments and extensions of time.—Adjournments and extensions of time may be granted upon the application of any party in the discretion of the Commission.

RULE XII.

Stipulations.—The parties to any proceeding or investigation before the Commission may, by stipulation in writing, filed with the Secretary, agree upon the facts or any portion thereof involved in a controversy, which stipulation shall be regarded and used as evidence on the hearing. It is desirable that the facts be thus agreed upon whenever practicable.

RULE XIII.

Hearings.—Upon the service of an answer to a complaint, the Commission will assign a time and place for hearing the matter, which will be at its office unless otherwise ordered. Witnesses will be examined orally before the Commission, unless otherwise ordered by the Commission, or unless the facts be agreed upon (as provided for in these rules). The complaint may establish the facts alleged, unless the same are admitted in the answer, or the Commission may investigate the facts relevant to the issue or to the subject matter complained of. The person or corporation complained against must fully disclose its defense at the hearing.

In case of failure to answer, the Commission shall take such proof of the facts as may be deemed proper and reasonable, and make such order thereon as the circumstances of the case appear to require.

Hearings will be held by or before the Commission, or by or before a Commissioner, and the word "Commission" in these rules will be construed to include a commissioner conducting or presiding at a hearing.

(As amended August 7, 1908.)

RULE XIV.

Witnesses and subpoenas.—Subpoenas requiring the attendance of witnesses for the purpose of taking the testimony of such witnesses orally before one or more members of the Commission, or by deposition, will, upon the application of either party, or upon an order of the Commission directing the taking of such testimony, be issued by any member of the Commission or by the Secretary.

Subpoenas for the production of books, papers or documents (unless directed to issue by the Commission upon its own motion) will only be issued, in the discretion of the Commission, upon application in writing.

RULE XV.

Proposed findings and briefs.—Proposed findings embracing material facts claimed to be established by the evidence and referring to the particular part of the record relied upon to support each finding proposed, should be filed by each party. Printed or written arguments or briefs may be filed by any party. The copy of the proposed findings, brief or argument filed on behalf of any party must at the same time be served upon the adverse party or parties, personally or by mail, and notice of such service thereupon filed with the Secretary of the Commission. The time within which the proposed findings and printed or written arguments or briefs shall be filed in any case will be determined by the Commission upon submission of the testimony.

RULE XVI.

Rehearings.—After an order has been made by the Commission, any party interested therein may apply for a rehearing in respect to any matter determined therein, and the Commission may grant and hold such a rehearing, if, in its judgment, sufficient reason therefor be made to appear; if a rehearing shall be granted, the same will be determined by the Commission within thirty days after the same shall be finally submitted.

RULE XVII.

Orders.—Whenever the Commission shall investigate any matter complained of by the person or corporation aggrieved, it will make and

file an order either dismissing the petition or complaint or directing the person or corporation complained of to satisfy the cause of complaint in whole or to the extent which the Commission may specify and require.

RULE XVIII.

Service and effect of orders.—The orders of the Commission will be served and will take effect as prescribed in section 23 of the Act.

RULE XIX.

Fees of witnesses.—Witnesses shall be entitled to the fees prescribed by section 19 of the Act.

RULE XX.

Hearing upon a proposed change of law.—The Commission may, in its discretion, order a hearing upon the request of any person or corporation as to the advisability of any proposed change of law relating to any common carrier, railroad corporation or street railroad corporation, or as to the advisability of recommending the enactment of legislation with respect to any matter within its jurisdiction.

RULE XXI.

Governing the procedure to obtain the permission and approval of the Commission to the construction and operation of extensions of street surface railroads; wholly within the limits of any city or incorporated villages.—1st. The application for such permission and approval shall be by petition verified by the president or other officer of the street surface railroad, containing the matter hereinbelow required and asking that the Commission determine that such construction and operation is necessary or convenient for the public service, and give its permission and approval thereto.

2nd. With the petition there shall be filed with the Commission,

(a) A copy of the articles of association of the street surface railroad corporation, certified by the Secretary of State and the county clerk, and showing the date of filing.

(b) Copies of all statements filed at any time in procuring extensions heretofore authorized and constructed, certified by the Secretary of State and the county clerk and showing the date of filing.

(c) A copy of the statement of the names and descriptions of the streets, roads, avenues and highways in or upon which it is proposed to construct, maintain and operate such extensions or branches filed pursuant to section 90 of the Railroad Law and for which construction and operation the permission and approval of the Commission is sought. Said copy to be certified by the Secretary of State and the county clerk and to show the date of filing.

(d) A certified copy of the written application for the consent of the local authorities to the construction and operation of such

extension, and the consent of the local authorities granted thereon, if such consent has been granted; and, if not, the petition shall contain a statement to that effect.

(e) A certified copy of the report of the Commission appointed by the Appellate Division of the Supreme Court pursuant to section 94 of the Railroad Law and the order of the court thereon, if such report and order have been made, and if such report and order have not been made the petition shall contain a statement to that effect.

(f) A map of the said extension as proposed showing the streets, avenues and highways in or upon which it is proposed to construct such extension.

(g) All copies of documents so filed shall be printed or typewritten and so far as practicable shall be upon paper eight by eleven inches in size, and bound on the left edge.

3rd. The petition shall:

(a) Show whether the consent of the abutting property owners has been obtained and recorded, and if recorded the time and place thereof.

(b) State that the company has not prior to June 6, 1907, received a certificate of public convenience and necessity for the construction of such extension.

4th. If any of the documents hereinabove required have been already filed with the Commission, duplicates need not be filed, but the petition shall show that they have already been filed and the date of filing.

5th. Upon receipt of such petition, the Commission shall appoint a time and place for a hearing upon such application, giving to the applicant ten days notice thereof, either personally or by mail; and the applicant shall publish at least three days prior to such hearing, a notice of such application and hearing, setting out the names and description of the streets, roads and avenues in and upon which it is proposed to construct and operate such extension or such matter as the Commission may require, in such newspapers and at such times as the Commission shall direct. The Commission may at the request of the applicant or on its own motion prescribe a shorter notice for such hearing and modify the directions for publication accordingly.

6th. At the hearing proof must be made to the satisfaction of the Commission that the construction of such extension and the exercise of such franchise of operating the same is necessary or convenient for the public service.

7th. Proof must be made of the *bona fides* of the enterprise, and of the financial ability of the applicant to build the extension.

RULE XXII.

Governing applications for the permission and approval of the Commission for the construction of a railroad or of a street rail-

road or an extension of a railroad or of a street surface railroad not wholly within the limits of any city or village, or for the exercise of a franchise or right not theretofore lawfully exercised.—1st. The application for such permission and approval shall be

by petition verified by the president or other officer of the corporation, containing the matter hereinbelow required and asking that the Commission determine that such construction or the exercise of such franchise is necessary or convenient for the public service and give its permission and consent thereto.

2nd. With the petition shall be filed all documents required by the provisions of Rule XXI to be filed in proceedings under such rule, and any other documents or certified copies of records evidencing the franchise or right in question and its nature and extent, or extending, modifying or changing any of the purposes or powers of the applicant corporation.

3rd. The petition shall:

(a) Show whether in a proper case the consent of the abutting property owners has been obtained and recorded, and if recorded the time and place thereof.

(b) Show whether the company has prior to June 6, 1907, received any certificate of public convenience and a necessity for any purpose, and if so a certified copy of the same should be annexed.

(c) If the application is for permission to exercise a franchise or right not theretofore lawfully exercised, the reason why said franchise or right has not been theretofore exercised.

(d) Any other matter pertinent to the application.

4th. If any of the documents herein required have been already filed with the Commission, duplicates need not be filed, but the petition shall show that they have already been filed, and the date of filing. All copies of documents filed shall be printed or typewritten and so far as practicable shall be upon paper eight by eleven inches in size and bound on the left edge.

5th. Upon filing such petition the Commission shall fix a time and place for a hearing thereon, giving the applicant ten days' notice thereof, either personally or by mail, and the applicant shall publish at least three days prior to such hearing a notice of such application and hearing, setting forth specifically the route of the railroad or street railroad or the extension thereof which it is proposed to construct, or the nature of the franchise or right which it is proposed to exercise, or such other matter as the Commission may require, in such newspapers and at such times as the Commission may direct. The Commission may at the request of the applicant or of its own motion prescribe a shorter notice for such hearing and modify the directions for publication accordingly. The Commission may at the hearing or any adjourned session require the applicant to file any other documents or

records and to produce any evidence or proof which the Commission may deem pertinent to the application.

6th. At the hearing proof must be made by the applicant to the satisfaction of the Commission of full compliance with all provisions of law, respecting its organization and its right to construct the railroad, street railroad or extension, and its right to exercise such franchise or right, and that the construction and operation of the railroads or street railroad or extension or the exercise of the franchise or right, is necessary or convenient for the public service. If the application is for the extension of a street surface railroad beyond the limits of any city or incorporated village, the applicant must show whether it will be practically parallel with a street surface railroad already constructed and in operation. In all cases, proof must be made of the *bona fides* of the enterprise and of the financial ability of the applicant to construct the railroad, street railroad or extension or to operate or use the franchise or right in such way as to benefit the public service.

RULE XXIII.

Governing applications under section 54 of the Public Service Commissions Law.—1st. The applications shall be by petition verified by the president or other officer of the corporation, containing the matter hereinbelow required and asking that the Commission give the approval, permission or consent, which the applicant desires.

2nd. With the petition shall be filed the following papers:

(a) A copy certified by the Secretary of State and County Clerk, or other officer with whom the same are by law required to be filed, of the articles of association of the corporations which are parties to the proposed assignment, transfer, lease, contract or agreement, or which propose to be parties to the purchase, sale, acquisition or taking or holding the capital stock.

(b) Duly certified copies of all certificates, statements or other documents which modify, extend or change the purpose or powers of such corporations, or any of them.

(c) A form of the proposed instrument of assignment, transfer, lease, contract or agreement which shall contain a detailed description of the franchise or rights referred to or affected by such proposed assignment, transfer, lease, contract or agreement.

(d) If the application is made for authority to hold stock as collateral, a certified copy of the certificate of organization of the proposed pledges.

3rd. The petition shall contain a full and complete statement of the reasons for such assignment, transfer, lease, contract and agreement and the purposes thereof. If the petition asks for the authorization of the Commission of the purchase or acquisition, or taking or holding

by a railroad corporation or street railroad corporation of any part of the capital stock of a like corporation or common carrier, or for a stock corporation to take or hold more than ten percentum of the capital stock of a railroad or street railroad corporation or a common carrier as collateral security, the petition shall contain a full statement of the proposed transaction and the reasons therefor. The petition shall contain any other statement or information which may be pertinent to the application.

4th. If any of the documents hereinabove required have been already filed with the Commission, duplicates need not be filed, but the petition shall show that they have already been filed and the date of filing. The Commission may, in its discretion, dispense with filing any of the foregoing papers. All papers filed should be printed or typewritten on paper eight by eleven inches in size, and bound on the left edge.

5th. On filing the said petition, the Commission may grant the application *ex parte* and give its consent, permission, authorization or approval as the case may be, or it may fix a time and place for hearing the application, and the applicant shall give such notice thereof either by publication thereof or service upon specified persons, or both, as the Commission may direct.

6th. At the hearing proof must be made that such assignment, transfer, lease, contract or agreement or the purchase or acquisition of stock, as the case may be, is for the benefit of the public service.

RULE XXIV.

Governing applications under section 55 of the Public Service Commissions Law, for the approval of the issue of stock, bonds, notes and other evidence of indebtedness.—1st. Applications shall be by petition verified by the president or other officer of the corporation, containing the matter hereinbelow required and asking for an order authorizing the issue desired.

2nd. With the petition shall be filed:

(a) A copy of the certificate of organization of the petitioning corporation, certified by the Secretary of State and the county clerk.

(b) Duly certified copies of all certificates, statements or records which modify, change or extend the purposes or powers of such corporation, showing when and where such documents were filed or entered.

(c) Duly certified copies of any certificate, record or order required by law to be made or filed in order to authorize the corporation to exercise any of its franchises or rights.

(d) If the application is in regard to an increase or reduction of capital stock a certificate of the proceedings at the meeting of the stockholders, or the unanimous consent thereof.

(e) If the application is in regard to a mortgage, proof of the consent of the stockholders under the statute.

3rd. The petition shall contain:

(a) A sworn statement in detail of the financial condition of the company, giving the amount and kinds of the capital stock outstanding and the rate and amount of dividends declared thereon during the past five years, the outstanding indebtedness, whether and how secured, and if secured by mortgage or pledge, a copy of the instrument shall be annexed to the petition, a description of the road, and in general terms of its equipment, and a statement of the cost of its existing property. It shall contain a statement of the amount of any of its stock held by other corporations and their names and the amount held by each.

(b) A statement of the amount and kind of stock which the corporation desires to issue, and, if preferred, the rate of dividends secured to be paid by it, and whether cumulative, a statement of the amount of bonds, notes and other evidence of indebtedness which the corporation desires to issue, the terms, the rate of interest and whether and how to be secured, and if to be secured by a mortgage or pledge, the terms thereof.

(c) A statement of the use to which the capital to be secured by the issue of such stock, bonds, notes or other evidence of indebtedness is to be put with a definite statement of how much is to be used for the acquisition of property, how much for the construction, completion, extension or improvement of facilities, how much for the improvement of its service, how much for the maintenance of its service, and how much for the discharge or refunding of its obligations.

(d) A statement in detail of the property which is to be acquired with its value, a detailed description of the construction, completion, extension or improvement of facilities set forth in such a manner that an estimate may be made of its cost, a statement of the character of the improvement of its service proposed, and of the reasons why the service should be maintained from its capital; if it is proposed to discharge or refund its obligations, a statement of the nature and description of such obligations including their par value and the amount for which they were actually sold and the application of the proceeds.

(e) A statement showing whether any contracts have been made for the acquisition of such property, or for such construction, completion, extension or improvement of facilities, or for the disposition of any of the stock, bonds, notes or evidence of indebtedness which it is proposed to issue or the avails thereof, and if any such contracts have been made, copies thereof should be annexed to the petition.

(f) A statement showing whether any of the outstanding stock or bonds or other obligations of the company have been issued or

used in capitalizing any franchise or any right to own, operate or enjoy any franchise or any contract for consolidation or lease, and if so, the amount thereof and the franchise, right, contract or lease so capitalized.

(g) If the stock is to be issued by a corporation formed by the merger or consolidation of two or more other corporations, the petition shall contain a complete statement of the financial condition of the corporations so consolidated, of the kind required by subdivision (a) hereinabove set forth, and of their capital stock at the par value thereof.

(h) The petition shall contain a statement of any other facts pertinent to the application.

4th. If any of the documents have been filed with the Commission, duplicates need not be filed, but the time of filing shall be given. All papers should be printed or typewritten, and so far as practicable be on paper eight by eleven inches in size and bound on the left edge.

5th. On receipt of the petition, the Commission shall fix a time and place for a hearing thereon, and shall give to the applicant not less than ten days' notice thereof, either personally or by mail; the applicant shall publish a notice of the application and the time and place of the hearing, in such newspapers and at such times as the Commission shall direct. The Commission may prescribe the terms and contents of such publication. The Commission may at the request of the applicant, or on its own motion, prescribe a shorter notice for such hearing and modify its directions for publication accordingly.

6th. At a hearing the applicant shall produce such witnesses and furnish such books, papers, documents and contracts as the Commission shall at any time before final decision on the application require, and must establish to the satisfaction of the Commission that the proposed issue of stocks, bonds, notes or other evidence of indebtedness is for the benefit of the public service.

RULE XXV.

(ADOPTED NOVEMBER 18, 1907.)

The form and contents of complaints made as provided in section 71, regarding the price of gas and electricity, shall be as follows:

(1) The said complaint shall be directed to the Public Service Commission for the First District. It shall state the names of the corporations supplying gas or electricity, as the case may be, either within the City of New York or within such subdivision thereof, either Borough or County, as the complainants may desire to include within the complaint.

(2) It shall state that each of such companies is a corporation, if such be the fact, and that such corporations are authorized to sell, manufacture and supply gas or electricity, as the case may be, for heat,

light or power within the said territory, and that they are actually engaged in manufacturing, selling and supplying either gas or electricity for the purposes aforesaid.

(3) If the complaint is against gas companies, it shall state whether it is directed to the illuminating power or purity or the pressure or the price of gas. If against electrical companies, whether directed to the initial efficiency of the electric incandescent lamp supply or the regulation of the voltage of the supply system used for incandescent lighting or the price, and it shall specify the respects wherein the service is otherwise inadequate or the methods unreasonable, and if it is claimed that the price is excessive and unreasonable the price actually charged by such companies should be set forth, and the respects wherein or the reasons why it is unreasonable specified.

(4) The complaint shall state that each of the complainants is a customer or purchaser of either gas or electricity, as the case may be, from one or more of the said companies against whom the complaint is made.

(5) If the complaint is that the price of either gas or electricity is excessive, it should state that the price is excessive, unfair and unreasonable and is disproportionate to the proper cost of manufacturing and delivering either gas or electricity in the locality mentioned.

(6) The complaint may also contain any other specification of any illegal act on the part of said companies, or any violation of the charter or franchises of said companies or any of them, in respect of the manufacture, sale or supply of gas or electricity, or in its methods of conducting its business, and should demand the relief which the complainant desires.

(7) The complaint must be signed by not less than one hundred customers or purchasers of gas or electricity in the City of New York, or in such lesser territory as is included in the complaint, and the address of each signer shall be stated.

(8) A single complaint shall not include both gas and electricity.

(9) Upon such complaint being filed an order for a hearing shall be made returnable at such time as the Commission may direct. Such order may also include such other matters as the Commission may desire to be included in the investigation or hearing. A certified copy of the order with a copy of the complaint shall be served on each corporation affected thereby, and the hearing shall proceed at the time and place designated or at such other time to which the Commission or the Commissioner presiding may adjourn the same.

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RULES FOR THE COMMISSION OF THE SECOND DISTRICT.

RULE I.

General sessions.—The general sessions of the Commission for hearings will be held at its hearing room in the Capitol at Albany, at two o'clock in the afternoon of the days appointed for hearings. Special sessions may be held at other times and places when ordered by the Commission.

RULE II.

Complaints.—No particular form of complaint is required. The name of the corporation complained against must be stated in full and the full name and post office address of the complainant, with the full name and address of his attorney or counsel, if any, must be given. The act or omission complained of together with the facts and conditions generally relating thereto must be stated with precision, and if such act or omission is claimed to be a violation of any statute, attention should be called to the section of the statute relied upon. Complaint need not be verified.

RULE III.

Complaints under subdivision 2, section 48 of the Public Service Commissions Law.—Upon the presentation of a complaint, the charges in which are of such a nature as to admit of satisfaction under the provisions of subdivision 2, section 48 of the Public Service Commissions Law, an order will be made as of course and served with a copy of the complaint upon the person or corporation complained against, requiring that the matters complained of be satisfied or that the charges be answered in writing, within twenty days from the day of the service of the order. A shorter time for satisfaction or answer may be specified.

RULE IV.

Answers to complaints under subdivision 2, section 48 of the Public Service Commissions Law.—The person or corporation complained against must make satisfaction in the manner provided by statute, and notify the Commission or make answer within the time specified in the order. The original answer must be filed with the Secretary of the Commission at Albany, and a copy thereof be served by the person or corporation answering upon the complainant, either personally or by mail. Proof of service of such copy must be filed with the Secretary of the Commission and the complainant must forthwith, upon receipt of such copy, notify the Secretary of such receipt.

RULE V.

Hearings upon answer to complaints under section 48 of the Public Service Commissions Law.—After the filing of answer to a complaint as provided in Rule IV, a time and place for a hearing upon the issue made will be appointed, notice of which will be served upon all parties, and the proceedings thereafter will be as the Commission shall from time to time direct.

RULE VI.

Other complaints, including those under section 27, subdivision 2, of the Public Service Commissions Law.—Complaints which in the opinion of the Commission are not of such nature as to permit their satisfaction under the provisions of section 48 of the Public Service Commissions Law may be investigated by it in such manner as it deems proper, without notice to the person or corporation complained against. A copy of the complaint and of the report, if any, upon the *ex parte* investigation, may be served by mail upon the party or corporation complained against, who will be required to make answer to the same within twenty days. Upon the receipt of such answer a time and place may be appointed for a public hearing upon the complaint and answer, notice of which will be served by mail to all parties, and the proceedings thereafter will be as the Commission shall from time to time direct.

RULE VII.

Answers.—An answer must specifically admit or deny the material allegations of the complaint. If any or all of the allegations of the complaint are denied, the answer must set forth the facts as claimed to be by the party answering.

RULE VIII.

Notice in nature of demurrer.—A person or corporation complained against, who deems the complaint insufficient to show a breach of legal duty, may, instead of answering or formally demurring, serve on the complainant and the Commission notice that it demands a hearing on the complaint, and in such case the facts stated in the complaint will be deemed admitted. Upon receiving such notice of hearing a time and place for the same will be appointed, notice of which will be served upon all parties. Filing an answer, however, will not be deemed an admission of the sufficiency of the complaint, but a motion to dismiss for insufficiency may be made at the hearing.

RULE IX.

Amendments.—Amendments to any complaint, petition, answer, or other paper filed in any proceeding or investigation, may be allowed by the Commission in its discretion.

RULE X.

Adjournments and extensions of time.—Adjournments and extensions of time may be granted upon the application of any party in the discretion of the Commission. Applications for extensions of time should be accompanied by an affidavit showing a necessity therefor.

RULE XI.

Stipulations.—The parties to any proceeding or investigation before the Commission, may, by stipulation in writing filed with the secretary, agree upon the facts or any portion thereof involved in the controversy, which stipulation shall be regarded and used as evidence on the hearing. It is desirable that the facts be thus agreed upon whenever practicable.

RULE XII.

Practice on hearings.—The complainant must in all cases establish the facts alleged to constitute a violation of the law, unless the defendant admits the same or fails to answer the complaint. The defendant must also give evidence of the facts alleged in the answer, unless admitted by the complainant, and must fully disclose its defense at the hearing. Witnesses will be examined orally before the Commission unless the facts be stipulated. In case of failure to answer, the Commission will take such proof of the facts as may be deemed proper and reasonable and make such order thereon as the circumstances of the case appear to require.

RULE XIII.

Subpoenas.—Subpoenas requiring the attendance of witnesses from any place in the State to any designated place of hearing for the purpose of taking the testimony of such witnesses orally before the Commission or one or more Commissioners, may, upon the application of either party, or upon the order of the Commission directing the taking of such testimony, be issued by any member of the Commission, or by the Secretary. The Commission may, as a condition of issuing a subpoena, require the party applying therefor to prepay the fees of the witnesses required, as prescribed by section 19 of the Public Service Commissions Law.

Subpoenas for the productions of books, papers or documents (unless directed to issue by the Commission upon its own motion) will only be issued upon application in writing. When it is sought to compel witnesses, not parties to a proceeding, to produce such documentary evidence, the application must be sworn to and must specify, as nearly as may be, the books, papers or documents desired; that the same are in the possession of the witness, or under his control, to the information and belief of the affiant, stating such information or the reasons of such belief, and also by facts stated show that they contain material

evidence necessary to the applicant. Applications to compel a party to the proceeding to produce books, papers or documents need only set forth in a general way the books, papers or documents desired to be produced, and that the applicant believes they will be of service in the determination of the case.

RULE XIV.

Documentary evidence.—Where relevant and material matter offered in evidence is embraced in a written or printed statement, book or document of any kind containing other matter not material or relevant and not intended to be put in evidence, such statement, book or document in whole shall not be received or allowed to be filed, but counsel or other party offering the same shall present in convenient and proper form for filing, a copy of such material and relevant matter, and that only shall be received and allowed to be filed as evidence and made a part of the record; provided, however, if practicable, such matter may be read and taken down by the stenographer as a part of the record.

RULE XV.

Briefs.—Upon all contested hearings, unless otherwise specially ordered, printed briefs shall be filed on behalf of the parties. They shall contain an abstract of the evidence relied upon by the party filing the same, and in such abstract reference shall be made to the pages of the minutes where the evidence appears. The abstract of the evidence shall follow the statement of the case and precede the argument. Briefs shall be filed with the Commission and served upon the adverse party or parties by the complainant within fifteen days after the taking of testimony has been concluded, and by the other party or parties within ten days thereafter, and the complainant shall have five days additional time for reply. Different times may be specially ordered in any case. Ten copies of each brief shall be filed for the use of the Commission, with the Secretary, and shall be accompanied by an affidavit showing service upon the adverse party. Three copies shall, in each case, be served upon the adverse party. Briefs and other papers required to be printed shall be ten inches long and seven inches wide, with the printed page seven inches long and three and one-half inches wide.

RULE XVI.

Rehearings.—Applications for reopening a case after final submission, or for rehearing after decision made by the Commission, must be by verified petition, and must state specifically the grounds upon which the application is based. If such application be to reopen the case for further evidence, the nature and purpose of such evidence must be briefly stated, and the same must not be merely cumulative. If the application be for a rehearing, the petition must specify the findings

of fact and conclusions of law claimed to be erroneous, with a brief statement of the grounds of error; and when any decision, order or requirement of the Commission is sought to be reversed, changed or modified on account of facts and circumstances arising subsequent to the hearing, or of consequences resulting from compliance with such decision, order, or requirement which are claimed to justify a reconsideration of the case, the matters relied upon by the applicant must be fully set forth.

RULE XVII.

Service and effect of orders.—The service and effect of orders are prescribed by section 23 of the Public Service Commissions Law.

RULE XVIII.

Applications for consent, etc., to be by petition.—All applications for the consent, permission, certificate or authorization of the Commission, in cases where such consent, permission, certificate or authorization is required by law, shall be by petition, signed by the applicant and verified by the applicant, if a person. If the applicant be a corporation the petition shall be verified by some officer authorized by law to verify a pleading in a court of record, and the verification shall be in the form required by the code of procedure for pleadings in such courts.

The petition must, in all cases, set forth the full name and post office address of the applicant, and of its attorney or counsel, if any there be, and if the applicant be a corporation other than municipal, the date of incorporation, term of corporate existence. It must contain a request for the specific consent or authorization desired, with a reference to the particular provision of law requiring the same.

RULE XIX.

Financial condition. Term as used in these rules defined.—Whenever by these rules a petitioner is required to set forth or disclose its financial condition, such financial condition shall be given, so far as practicable, in appropriate schedules annexed to and referred to and properly designated in the petition. Such schedules shall show the following: (1) Amount and kinds of stock authorized; (2) amount and kinds of stock issued; (3) terms of preference of all preferred stock; (4) brief description of each mortgage upon property of petitioner, giving date of execution, name of trustee, amount of indebtedness authorized to be secured thereby and amount of indebtedness actually secured; (5) number and amount of bonds authorized and issued, describing each class separately, giving date of issue, par value, rate of interest, date of maturity and how secured; (6) other indebtedness, giving same by classes and describing security, if any; (7) amount of interest paid during previous fiscal year and rate thereof, if different

rates were paid amount paid at each rate; (8) amount of dividends paid during previous fiscal year and rate thereof; (9) detailed statement of earnings and expenditures for and balance sheet showing condition at close of last fiscal year.

RULE XX.

Applications for permission and approval to exercise franchise under section 53, Public Service Commissions Law, and for certificate of convenience and necessity under section 59, Railroad Law.—

Applications for permission and approval to exercise franchises and privileges under section 53 of the Public Service Commissions Law, and applications for a certificate of convenience and a necessity under section 59 of the Railroad Law, may be embraced in one petition, and may be carried on in one proceeding. In all such applications the petitioner shall comply with all of the provisions of sections 59 and 60 of the Railroad Law, and in addition thereto the petition must state concisely:

1. The route of proposed railroad, street railroad, or extension, giving the names of the cities, villages or towns in and through which it is to be constructed.

2. The name of each railroad and street railroad corporation with which the proposed construction is likely to compete.

3. The facts showing the proposed construction to be required by public convenience and necessity.

4. All other facts deemed material by the petitioner.

5. If the applicant has not exercised any of the powers or privileges of a corporation, it must set forth the manner in which it proposes to finance the proposed construction.

6. If the applicant has theretofore exercised the powers of a corporation, it must set forth the manner in which it proposes to finance the proposed construction and also its financial condition.

The petition must be accompanied by a copy of the articles of incorporation of the petitioner, certified by the Secretary of State, and of all amendments thereto, maps and profiles showing the location and route of the proposed construction and proof of compliance with all conditions required by law precedent to such application.

RULE XXI.

Applications under section 54 of the Public Service Commissions Law for approval of assignment, transfer or lease of franchise.—In all applications under section 54 for approval of assignment, transfer or lease of franchise, or right to or under any franchise to own or operate a railroad or street railroad, or for approval of any contract or agreement with reference to or affecting any such transfer or right, the petition must be made by all the parties to the proposed transaction, and must show:

1. The financial condition of each applicant.

2. In detail the reasons upon the part of each applicant for making the proposed assignment, transfer, lease, contract or agreement and all the facts warranting the same, and all facts which should be known by the Commission to enable it to pass upon the application. The petition must be accompanied by copies of the articles of incorporation of each applicant, certified by the Secretary of State, and of the franchise, contract or agreement annexed as schedules thereto.

RULE XXII.

Applications under section 54 of the Public Service Commissions Law for authorization to purchase or acquire capital stock of any domestic railroad corporation, street railroad corporation, or other common carrier.—In all applications for authorization to purchase or acquire capital stock of any domestic railroad corporation or other common carrier, the petition must show:

1. In detail the reasons why the applicant desires to make the proposed purchase and all the facts warranting the same, including amount of such stock already owned by the applicant.

2. The market value of the stock proposed to be purchased with highest and lowest price during a period of at least one year prior to the making of the petition, dividends, if any, paid for a period of five years prior to making of petition, the price proposed to be paid, the name of the present owner and the terms of payment.

3. In case of an application for authorization to purchase stock of a certain description as opportunity may offer, the reasons therefor in full detail, with a statement of market values and dividends paid for at least five years prior to making of petition and the maximum price which the petitioner should be allowed to pay.

4. In all cases there must be submitted a copy of the articles of incorporation of the corporation whose stock is proposed to be purchased, certified by the Secretary of State, and a statement showing the amount of stock issued and the financial condition of the corporation issuing the same.

RULE XXIII.

Applications for consent to mortgage property and franchises pursuant to subdivision 10, section 4 of the Railroad Law.—An application for consent to mortgage property and franchises pursuant to subdivision 10, section 4 of the Railroad Law, may be embraced in one petition and may be carried on in one proceeding with an application for an order authorizing the issue of bonds or other evidence of indebtedness to be secured by the proposed mortgage. If the application be for consent to mortgage only, it will be governed by the provisions of Rule XXIV. In every case the petition must be accompanied by proof of the consent of the stock holders required by law and by a copy of the proposed mortgage.

RULE XXIV.

Applications under section 55 of the Public Service Commissions Law for an order authorizing the issue of stocks, bonds, notes or other evidence of indebtedness.—In applications under section 55 of the Public Service Commissions Law for an order authorizing the issue of stocks, bonds, notes or other evidence of indebtedness, the petition must show:

1. Amount and terms of proposed issue and purposes for which the proceeds are to be used.
2. If the purpose is the acquisition of property, a general description of the property, from whom to be acquired and terms of the contract for such acquisition if any has been made. Names of owners of property to be acquired for right of way need not be set out, but a general description of the proposed route should be given.
3. If the purpose is for the construction, completion, extension or improvement of facilities, the existing facilities must be concisely set forth as well as those proposed.
4. If the purpose is the improvement or maintenance of service, the existing service must be concisely set forth as well as the improvements or betterments proposed.
5. If the purpose is the refunding of obligations such obligations must be described fully, showing amount, date of issue, date of maturity and all other material facts concerning the same.
6. The financial condition of the applicant.
7. If the application is for authorization of bonds to be secured by an existing mortgage, amount of bonds, if any, already issued upon such security and amount and application made of proceeds of same.
8. If the proceeds are to be used for construction purposes, the affidavit of a competent person must be annexed showing the estimated cost of such construction in reasonable detail.
9. In applications for the issue of stock the petition must state that no franchise is capitalized directly or indirectly, except as the same is authorized by section 55 of the Public Service Commissions Law. In case it is proposed to capitalize any franchise as therein authorized there shall be filed with the petition a verified copy of such franchise and an affidavit of the proper officer of the State or municipality granting the same, showing the amount that has been actually paid for such franchise.
10. If any contract, agreement or arrangement, verbal or written, has been made to sell the stock, bonds, notes or other evidence of indebtedness proposed to be issued, such contract, agreement or arrangement must be set out in full, with copy of the same, if in writing.
11. If no contract, agreement or arrangement has been made for the sale or disposal of the stock, bonds, notes or other evidence of indebtedness proposed to be issued, there must be annexed an affidavit of a com-

petent person showing the amount which can probably be realized from the sale or disposition thereof, and the reasons for the opinion of the affiant.

There must be annexed to the petition an affidavit made by at least three of the directors of the applicant, showing that it is the intention of the applicant in good faith to use the proceeds of the stock, bonds, notes or other evidence of indebtedness proposed to be issued, for the purposes set forth in the petition.

RULE XXV.

Applications under section 55, for authorization, etc., continued.—The order granting an application, or any part thereof, under section 55, shall contain the following provisions:

1. Prescribing the purposes for which the proceeds of the security or obligation authorized shall be used.

2. Directing the applicant to report under oath the sale or sales of the obligations authorized, the terms and conditions of such sale and the amount realized therefrom.

3. That the applicant shall make a verified report at least once every six months showing in detail the use and application by it of the moneys so realized, until such moneys shall have been fully expended.

4. Such other provisions as the commission may deem necessary or appropriate in each case.

RULE XXVI.

Applications under section 68 of the Public Service Commissions Law by a gas or electric corporation.—In applications under section 68 of the Public Service Commission Law, the petition must set forth:

1. All the facts upon which the petitioner relies to entitle it to begin construction or exercise the franchise owned by it.

2. The financial condition of the applicant.

Annexed to the petition shall be a certified copy of the charter of the applicant, a verified copy of the consent of the proper municipal authorities and the verified statement of the president and secretary of the corporation showing that it has received the required consent of the proper municipal authorities.

There must be annexed to the petition an affidavit made by at least three of the directors of the applicant showing that it is the intention of the applicant in good faith to begin the construction and to exercise the franchise named in the petition.

RULE XXVII.

Application by a municipality under section 68 of the Public Service Commissions Law.—The petition of a municipality under section 68 of the Public Service Commissions Law for a certificate of authority to build, maintain and operate a work or system of manu-

facturing and supplying gas or electricity for lighting purposes, other than municipal purposes, shall set forth:

1. The name and location of the principal office of all gas and electric corporations doing business within the municipality.

2. The names of the executive officers of each such gas or electric corporation.

3. A general statement of the amount and character of services rendered within such municipality by each gas or electric corporation therein.

4. A statement showing by what authority the municipality will have the right to build the proposed work or system upon receiving a certificate of authority from the commission.

5. A description of the works or system proposed to be constructed.

6. The manner in which it proposes to pay for or finance the construction of the proposed works or system.

RULE XXVIII.

Applications under section 69 of the Public Service Commissions Law by a gas corporation or electric corporation for an order authorizing the issue of stock, bonds, notes or other evidence of indebtedness.—Applications under section 69 of the Public Service Commissions Law will be governed by the provisions of Rule XXIV, and the order by the provisions of Rule XXV.

RULE XXIX.

Applications under section 70 of the Public Service Commissions Law.—Applications under section 70 of the Public Service Commissions Law will be governed by the provisions of Rule XXI.

RULE XXX.

Complaints as to quality and price of gas and electricity under section 71 of the Public Service Commissions Law.—Upon informal application the Commission will prescribe the form and contents of complaints made under section 71 of the Public Service Commissions Law, according to the requirements of the case. Any formal complaint which the Commission deems inadequate as to form or contents will be returned with explicit instructions for the preparation of a proper complaint.

RULE XXXI.

Applications under section 46 of the Stock Corporation Law to increase or reduce capital stock.—Applications for the increase of capital stock are governed by Rule XXIV.

In all applications for the reduction of capital stock the petition must show:

1. The financial condition of the applicant.

2. The reasons for the proposed reduction.

3. That the proposed amount of capital stock is sufficient for the proper purposes of the corporation.

Accompanying the petition of railroad corporations there must be filed with the Commission three certificates of the proceedings of the meeting of stockholders authorizing the increase or reduction, or unanimous consent of stockholders, two of such certificates to be endorsed for filing and one to be filed in the office of the Commission.

RULE XXXII.

Applications relating to grade crossings under sections 60-69 of the Railroad Law.—All applications relative to grade crossings must be by verified petition. In all cases where the statute is not sufficiently explicit as to the contents of the petition, the Commission will, upon informal application, advise the applicant as to the matters necessary to be set forth in the particular case.

RULE XXXIII.

Sundry applications for which no general rule is made.—Applications in the following cases must be made by verified petition. Upon the filing of the petition the Commission will determine the practice in the case, no general rule being prescribed.

1. Sign boards at crossings.
§ 33 Railroad Law.
2. Discontinuance of stations.
§ 34 Railroad Law.
3. Accommodation of connecting roads.
§ 35 Railroad Law.
4. Precedence of trains at grade crossings.
§ 36 Railroad Law.
5. Approval of safety devices.
§ 50 Railroad Law.
6. Approval of stoves or furnaces in dining-room car.
§ 51 Railroad Law.
7. Cessation of operation during winter by certain roads.
§ 55 Railroad Law.
8. Fixing compensation for transporting mail.
§ 56 Railroad Law.
9. Extension of time to make reports.
§ 46 Public Service Commissions Law.
10. Crossing of one road by another.
§ 68 Railroad Law.
11. Liability of reorganized railroad company to extend its road.
§ 83 Railroad Law.

12. Motive power of street railroads.
§ 100 Railroad Law.
13. Compensation for use of tracks of street railroad.
§ 102 Railroad Law.
14. Abandonment of part of route of street surface railroad.
§ 103 Railroad Law.
15. Change of gauge.
Laws of 1891, Chap. 267.

RULE XXXIV.

Practice on receiving petitions.—On receiving any petition required by these rules, the Commission will refer the same as of course to its executive clerk for examination. If it is found to conform to these rules and all statutory provisions, the executive clerk will report that fact to the Commission. If it does not so conform, he will advise the applicant of the defects, who may correct the same.

When the petition and accompanying papers are in proper form, a time and place for a hearing thereon will be appointed. The Commission will, in each case, direct what notice of the hearing shall be given, by publication or otherwise, and to whom.

At the hearing the applicant must be prepared to establish all the facts alleged in the petition by evidence, but the Commission may, in such cases as it deems proper, grant the application upon the petition and accompanying papers.

The applicant must furnish for the use of the Commission in determining the application, the originals of all books, papers and documents which it may require, or certified or verified copies of the same. The failure so to do shall be ground for refusing the application.

APPENDIX A.

THE RAPID TRANSIT ACT.

APPENDIX A.

THE RAPID TRANSIT ACT

OF THE

STATE OF NEW YORK,

Being L. 1891, ch. 4, entitled

“AN ACT to provide for rapid transit railways in cities of over one million inhabitants,” and acts amendatory thereof.

Approved by the Governor January 31, 1891. Passed, three-fifths being present.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:**

Section 1. Board of rapid transit railroad commissioners created — Commissioners — Filling of vacancies.—In each city having over one million of inhabitants, according to the last preceding national or state census, there shall be a board of rapid transit railroad commissioners in and for such city, which shall consist of the mayor of such city, the comptroller or other chief financial officer of such city, the president of the chamber of commerce of the state of New York, by virtue of his office, and the following named persons, to wit: William Steinway, Seth Low, John Claffin, Alexander E. Orr and John H. Starin. The members of said board shall be styled commissioners of rapid transit. Vacancies which may take place in the offices so held by the persons specifically named herein as such commissioners shall be filled by a majority vote of the remaining members of said board. Provided, however, that vacancies which may at any time after the first day of January, nineteen hundred and six take place in the offices so held by the persons specifically named herein as such commissioners, or by their successors heretofore elected, shall be filled by the mayor

*The headnotes of sections are not part of the statute as enacted.—Ed.

of such city, and any person so hereafter appointed by the mayor of such city to fill any such vacancy shall be a citizen of the United States and of the state of New York and a bona fide resident of the city in which such person is appointed. The board thus constituted shall have and exercise the specific authority and powers hereinafter conferred and also such other and necessary powers as may be requisite to the efficient performance of the duties imposed upon said board by this act.

(As amended by L. 1894, ch. 752; L. 1906, ch. 472.)

§ 2. Oath of commissioners.— Each of the said commissioners other than the mayor and comptroller or other chief financial officer of such city shall take and subscribe an oath faithfully to perform the duties of his office, which oath shall be filed in the office of the clerk of any county within which there shall be a city of the class mentioned in the first section of this act.

(As amended by L. 1894, ch. 752.)

§ 3. First meeting — By-laws and rules — Quorum — Seal — Record.— Within twenty days after the filing of the oaths of said commissioners so required to make and file the same the commissioners of rapid transit in respect to each of such cities shall meet and organize as a board. The board when so organized, may frame and adopt by-laws not inconsistent with this act, and establish suitable rules and regulations for the proper exercise of the powers and duties hereby conferred and imposed, and may, from time to time, amend the same. Four members of the board shall constitute a quorum for the transaction of business, but a less number may adjourn meetings. The said board shall adopt a seal, and keep a record of its proceedings, which shall be a public record and be open to inspection at all reasonable times.

(As amended by L. 1894, ch. 752.)

§ 4. Board to determine necessity of railways and to fix routes — General plan of construction — Location of routes — Provision as to consents; parks and certain streets excepted — Tunnels and elevated roads.— The said board upon its own motion may proceed, from time to time, to consider and determine whether it is for the interest of the public and of the city in which it is appointed, that a rapid transit railway or railways for the conveyance and transportation of persons and property should be established therein, and upon the request in writing of the local authorities of any such city at any time, the said board shall proceed forthwith to consider and determine the same questions, and in each case the said board shall conduct such an inquest and investigation as may be deemed necessary in the premises. If, after any such consideration and inquest, the said board shall determine that a rapid transit railway or railways, in addition

to any already existing authorized or proposed are necessary for the interest of the public, and such city, it shall proceed to determine and establish the route or routes thereof and the general plan of construction. Such general plan shall show the general mode of operation and contain such details as to manner of construction as may be necessary to show the extent to which any street, avenue or other public place is to be encroached upon and the property abutting thereon affected, and the concurrent votes of at least six members of the board shall be necessary for the purpose of determining and establishing such route or routes and plan of construction. The said board, from time to time, may locate the route or routes of such railway or railways over, under, upon, through and across any streets, avenues, bridges, viaducts, rivers, waters and lands within such city, including blocks between streets or avenues or, partly over, under, upon, through and across any streets, avenues, bridges, viaducts, and lands within such city and partly through blocks between streets or avenues; provided that the consent of the owners of one-half in value of the property bounded on and the consent also of the local authorities having control of that portion of a street, bridge, viaduct, or highway, upon which it is proposed to construct or operate such railway or railways be first obtained, or in case the consent of such property owners cannot be obtained, that the determination of three commissioners appointed by the general term of the supreme court in the district of the proposed construction, given after due hearing of all parties interested, and confirmed by the court, that such railway or railways ought to be constructed or operated, be taken in lieu of the consent of such property owners; except that no public park nor any lands or places, lawfully set apart for, or occupied by, any public building of any city or county, or of the state of New York, or of the United States, nor those portions of Grand, Classon, Franklin avenues and Downing street in the city of Brooklyn, lying between the southerly line of Lexington avenue and northerly line of Atlantic avenue, nor that portion of Classon avenue in said city lying between the northerly line of Lexington avenue and southerly line of Park avenue, nor that portion of Washington avenue in said city lying between Park and Atlantic avenues, nor DeBevoise place, Irving place and Lefferts' place, Lee avenue, Nostrand avenue, Waverly avenue, Vanderbilt avenue and Clinton avenue in said city of Brooklyn, nor that portion of the city of Buffalo lying between Michigan and Main streets, nor any part of Fifth avenue in the city of New York, nor that portion of any street or avenue which is now actually occupied by any elevated railroad structure, shall be occupied by any corporation to be organized under the provisions of this act for the purpose of constructing a railway in or upon any of such public parks, lands or places, or upon or along either of the said excepted streets or avenues. It shall be lawful for said commissioners to locate the route of a rail-

way or railways, by tunnel under any such public parks, lands, places, rivers or waters and to locate the route of any railway to be built, under this act, across any of the streets and avenues now occupied by an elevated railroad structure in the city of New York, or across any of the streets or avenues excepted in this act at any point at which, in its discretion, the board of rapid transit railroad commissioners may deem necessary in the location of any route or routes, or under, or under and along, any of said streets or avenues now so occupied or so excepted in this act. Nothing in this act shall authorize the construction of an elevated railway on Broadway south of Thirty-third street, nor on Madison avenue in the city of New York. It shall not be lawful to grant, use or occupy, for the purposes of an elevated railroad, except for the purpose of crossing the same, any portion of the following named streets and places in the city of New York, that is to say: Second avenue below Twenty-third street; Fourteenth street, between the easterly line or side of Seventh avenue, and the westerly side of Fourth avenue; nor Eleventh street, west of Seventh avenue, nor any part of Bank street; Nassau street; Printing House square, so called, south of Franklin street; Park row, south of Tryon row; Broad street and Wall street.

2. The provisions of the said section 4 of the said act shall, with reference to any rapid transit railroad for which routes and a general plan have been heretofore adopted by the board of rapid transit railroad commissioners of any city and for the municipal construction of which a contract has been heretofore made by any city, be deemed to have been in full force as hereby amended from before the time when the routes and general plan for such railroad or railroads were so adopted by the board of rapid transit railroad commissioners.

(As amended by L. 1894, ch. 528; L. 1894, ch. 752, § 10; L. 1895, ch. 519; L. 1900, ch. 616; L. 1904, ch. 564.)

§ 5. Approval of plans by board of estimate and apportionment — Consents of property owners — Ascertainment of value — Commissioners to determine whether railroad shall be constructed.—After any determination by said board of any such route or routes and of any general plan of construction of said railway or railways, the said board shall transmit to the board of estimate and apportionment or other board or boards of said city having the control of any street, highway, boulevard, driveway, bridge, tunnel, park, parkway, dock, bulkhead, wharf, pier or public grounds or water which is within or belongs to the city, a copy of said plans and conclusions as adopted. It shall be the duty of such board of estimate and apportionment and of every other such board or boards having such control, upon receiving such copy of plans and conclusions to appoint a day not less than one week nor more than ten days after the receipt thereof for the consideration of such plans and conclusions, and the said board

of estimate and apportionment and every other such board having such control shall, on the day so fixed, proceed with the consideration thereof and may continue and adjourn such consideration, from time to time, until a final vote shall be taken thereon, as hereinafter provided. Within sixty days after the copy of such plans and conclusions adopted by the board of rapid transit railroad commissioners shall have first been received by said board of estimate and apportionment or such other board or boards having such control, a final vote shall be taken thereon, by ayes and nays, according to the number of votes by law pertaining to each member of any such board in the form of a vote upon a resolution to approve such plans and conclusions, and to consent to the construction of a railway or railways in accordance therewith. Upon the adoption of such a resolution by a majority vote of all the members of the said board of estimate and apportionment or other such board or boards having such control according to the number of votes by law pertaining to each member of any such board and the approval of the mayor, the said plans and conclusions shall be deemed to have been finally consented to and adopted, and such consent shall be deemed to be consent of the local authorities of such city; provided, that where in any such city the exclusive control of any street, road, bridge, viaduct, highway or avenue which is to be used or occupied by any railway or railways constructed under the provisions of this act, is by law vested in any local authority other than the board of estimate and apportionment of such city, the approval of the aforesaid plans and conclusions and the consent to the construction of a railway thereunder shall be given by such local authority in place of and if required in addition to such approval and consent by said board of estimate and apportionment and with like effect. Upon obtaining the approval and consent of the local authorities as above provided, the said board of rapid transit railroad commissioners shall also, unless such approval and consent of local authorities shall have been refused, take the necessary steps to obtain, if possible, the said consents of the property owners along the line of the said route or routes. For the purposes of this act the value of the property bounded on that portion of any street or highway in, upon, over or under which it is proposed to construct or operate such railway or railways, or any part thereof, shall be ascertained and determined from the assessment roll of the city in which the said property is situated, confirmed or completed last before the local authorities shall have given their consent as above provided. If such consents of property owners cannot be obtained, the said board may, in its own name, make application to the appellate division of the supreme court in the judicial district in which such railway is to be constructed for the appointment of three commissioners to determine and report after due hearing whether such railway ought to be constructed and operated. Two weeks' notice of such application shall

be given by daily publication thereof, Sundays and holidays excepted, in six daily newspapers published in the city where such proposed railway is to be constructed, if there be so many newspapers published in said city, and if not, then in all the daily newspapers published in said city. The newspapers in which said publication shall be made shall be designated by the appellate division of the supreme court to which such application is to be made on the application of the commissioners without notice. The said appellate division, upon due proof of the publication aforesaid, shall appoint three disinterested persons who shall act as commissioners, and such commissioners within ten days after their appointment shall cause public notice to be given in the manner directed by the said appellate division of their first sitting, and may adjourn from time to time until all their business is completed. Vacancies in such commission may be filled by said appellate division after such notice to persons interested as the appellate division may deem proper, and the evidence taken before as well as after such vacancy occurred shall be deemed to be properly before such commissioners. The said commissioners shall determine after public hearing of all parties interested whether such railroad ought to be constructed and operated and shall report the evidence taken to said appellate division together with a report of their determination whether such road ought to be constructed and operated, which report, if in favor of the construction and operation of such road shall, when confirmed by said court, be taken in lieu of the consent of the property owners above mentioned. Such report shall be made within sixty days after the appointment of said commissioners, unless the said court, or a judge thereof, shall extend such time. The board of estimate and apportionment of the city of New York shall, with respect to that city, be hereafter for all purposes of this act and be deemed to be the local authority in control of the streets, roads, bridges, viaducts, highways, avenues, boulevards, driveways, parks, parkways, docks, bulkheads, wharfs, piers and public grounds and waters which are within or belong to the said city; and the consent of such board of estimate and apportionment and the mayor, without the consent of the common council, board of aldermen or other board or officer of the city, shall be the only consent of local authorities required hereunder.

2. This act and all the amendments hereby made to the sections thereof hereby amended, shall be applicable to every grant, franchise or contract heretofore made, authorized or issued by the said board of rapid transit railroad commissioners but not yet consented to by the common council or board of aldermen of the city, as well as to all grants, franchises and contracts hereafter made, authorized or issued by the said board of rapid transit railroad commissioners.

(As amended by L. 1895, ch. 519; L. 1904, ch. 564; L. 1905, ch. 631.)

§ 6. Detailed plans — Subways for pipes and wires — Work at points of subsurface structures — Expenses, how paid.— When the consents of the local authorities and the property owners, or, in lieu thereof, the authorization of the said appellate division of the supreme court upon the report of commissioners, shall have been obtained, the board of rapid transit railroad commissioners shall at once proceed to prepare detailed plans and specifications for the construction of such rapid transit railway or railways in accordance with the general plan of construction, including all devices and appurtenances deemed by it necessary to secure the greatest efficiency, public convenience and safety, including the number, location and description of stations and plans and specifications for the suitable supports, turnouts, switches, sidings, connections, landing places, buildings, platforms, stairways, elevators, telegraph and signal devices, and other suitable appliances incidental and requisite to what the said board may approve as the best and most efficient system of rapid transit in view of the public needs and requirements, and the said board may, in its discretion, include in said plans provisions for galleries, ways, subways or tunnels for sewers, gas or water pipes, electric wires and other subsurface structures and conductors proper to be placed underground, whenever necessary so to do, in order to permit of the proper construction of any railway herein provided for in accordance with the plans and specifications of the said board, or for any other purpose in furtherance of the public interest or convenience. Stations and station approaches may be under or over streets of the route or cross streets, and the board of aldermen, or other legislative body, of any such city shall have power to regulate by general or special ordinance or resolution, the erection, alteration and maintenance upon or in connection with any building used, wholly or in part for station purposes, or approaches, or any and all structures or parts of structures extending over the whole or any part of any sidewalks, or sidewalks adjacent thereto. The board may, from time to time, alter such detailed plans and specifications, but always so that the same shall accord with the general plan of construction; but whenever a contract shall have been made for the construction of any railway herein provided for, no such alteration shall be made by the board without the consent of the contractor and his sureties, except as liberty shall have been reserved in such contract by said board for such alteration. Whenever the construction of any railway, depressed way, subway or tunnel under the provisions of this act shall interfere with, disturb or endanger any sewer, waterpipe, gaspipe, or other duly authorized subsurface structure, the work of construction at such points shall be conducted in the city of New York in accordance with the reasonable requirements of the commissioner of public works, and in other cities in accordance with the reasonable requirements and under the supervision of the officer or local authority having the care of and

the jurisdiction or control over such subsurface structures so interfered with, disturbed or endangered. All expenses incidental to such supervision and to the work of reconstructing, readjusting and supporting any such sewer, waterpipe, gaspipe or other duly authorized subsurface structure shall be borne and paid by the company which shall have acquired the right, privilege and franchise to construct, maintain and operate such railway, pursuant to a sale of the same at public auction, as hereinafter provided, if any such sale shall be made by said board. Where under the direction of the said board or in pursuance of any general plan adopted or of any contract made by the said board, galleries, ways, subways or tunnels shall be constructed to contain sewers, pipes or other subsurface structures, the said galleries, ways, subways or tunnels shall be maintained by the said city and shall be in the care and charge of the said board and subject to such regulations as it shall prescribe not inconsistent with the provisions of this act, and any revenue derived therefrom shall be paid into the treasury of said city, except that where bonds shall have been issued to provide for the cost of construction or equipment of such railroads, such amounts shall be paid to the sinking fund of the city, if there be one, or if not then into the sinking fund, to be established and created out of the annual rentals of said road, as provided in section thirty-seven of this act. Provided, however, that any person or corporation who or which at the time of the construction of the said galleries, ways, subways, or tunnels shall own pipes, subways or conduits in a street, avenue or public place in which said galleries, ways, subways or tunnels shall be constructed pursuant to this act, shall be entitled to the use of such galleries, ways, subways or tunnels for his or its said pipes, subways or conduits in the same manner as the said person or corporation shall be entitled by law to the use of such street, avenue or public place, and that no rent shall be charged for such use, except a reasonable charge to defray the actual cost of maintenance, unless such pipes, subways or conduits shall be of greater capacity than those theretofore owned by such person or corporation in said street, avenue or public place, and that, if the capacity of any such pipe, subway or conduit, so placed in the said galleries, ways, subways or tunnels shall be increased, the rent shall be charged only for such increased capacity; and provided further, that the placing in any such galleries, ways, subways or tunnels of the subways or conduits of any corporation owning subways or conduits for electrical conductors, shall not in any wise affect the right of such corporation to charge and demand such compensation or rent for the use of said subways or conduits by other corporations or individuals as is, or may be, permitted by law. Nothing in this section or contained in the act hereby amended shall be construed as granting, enlarging, changing, or in any manner validating, any right, privilege or franchise, or any

claimed or alleged right, privilege or franchise, to maintain, operate or possess any gas mains, pipes or conductors, or any conduits or conductors for transmission of electricity, or any subsurface structures of any name or nature whatever, in any street, avenue, highway or public place in such city.

(As amended by L. 1892, ch. 556; L. 1894, ch. 752; L. 1895, ch. 519; L. 1896, ch. 729; L. 1902, ch. 542; L. 1906, ch. 472.)

§ 7. Public sale of franchises — Forfeiture and resale — Organization of corporations — Rate of fare — Duration of franchise.— If after having secured the necessary consents and after having prepared such detailed plans and specifications as are by this act provided for, it shall not have been determined by vote of the people as provided by sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four that such railway or railways shall be constructed for and at the expense of such city as hereinafter provided, said board shall sell at public auction in the city where said railway or railways are to be built and for the account and benefit of said city the right, privilege and franchise to construct, maintain and operate such railway or railways. Notice of the time and place of such sale shall be published three times a week for at least six successive weeks in at least three daily newspapers published in said city. The board may prescribe all such terms and conditions of sale as it may deem to be for the interest of the public and of the city in which the railway or railways are to be constructed. The advertisement of sale shall contain only so much of the said terms, plans and specification for the construction as the said board may think proper, but such advertisement must state at what place the full terms, plans and specifications may be examined, and they shall be subject to examination under such reasonable rules and regulations as the board may prescribe. The terms of sale shall provide for the construction of the railway or railways under the supervision of the board, and for the approval of an engineer or engineers to be appointed, from time to time, by the board, and the corporation or corporations to be organized for the purpose of constructing and operating such railway or railways as in this act provided shall pay such engineer or engineers such salary as may, from time to time, be fixed by the said board of rapid transit railroad commissioners. Such engineer or engineers shall hold their office at the pleasure of the said board. The terms of sale shall require the successful bidder to deposit with the comptroller or chief fiscal officer of the city, in cash or approved securities, such amount as the board may deem sufficient to constitute a guarantee of full compliance with the terms of sale by the purchaser and by the corporation to be formed for the purpose of building and operating said railway as hereinafter provided. Said bids and all rights which

may have been acquired thereunder shall become null and void and of no effect, at the option of said board, should there be a failure to organize a corporation to exercise such rights, privileges and franchises as required by said terms of sale and this act, or for any violation of any of the requirements of said terms of sale which should be complied with before such corporation is organized, and thereupon any deposit which may have been made pursuant to such terms of sale shall be paid into the treasury of such city upon a certificate being made and filed by said board with the public officer with whom such deposit shall have been made, that said bid, and all rights which have been acquired thereunder, have become null and void and of no effect; and said rights, privileges and franchises shall be again sold by said board, subject to all the provisions of this act regulating such sales. The terms of sale shall require the construction of the road to be begun within a time to be specified in said terms of sale, and to be finished within a certain time thereafter, to be specified therein, and may prescribe the time within which portions of the same shall be begun and finished. The said terms of sale may reserve to the board the power to extend the times for the commencement and completion of the construction of said railway, or of portions of the same, if, in its discretion, the said board deem such extension to be for the best interests of the city. In case the corporation formed for the purpose of constructing said railway shall fail to begin or finish the construction within the times for those purposes respectively limited, all rights, privileges and franchises of such corporations to maintain and operate said railway shall be forfeited, and upon such forfeiture being adjudged by the court in a suit brought for that purpose in the name of the mayor, aldermen and commonalty of the city of New York, or such other appropriate corporate title of said city or by said board of rapid transit railroad commissioners, then the said board shall have power to advertise and resell said rights, privileges and franchises and so much of the road as shall have been constructed by such corporation; such suit shall have preference over all other cases in all courts; and the proceeds of such resale shall be applied first to the payment of the expenses of the resale, and then to the discharge of any liens which may have been created upon such property, and the balance shall be paid over to the said corporation. The terms of sale must provide for the organization by the purchaser or purchasers of such rights, privileges and franchises of a corporation to exercise the same, and to construct, maintain and operate such rapid transit railway or railways, with the powers and subject to the duties and liabilities granted or imposed by this act. The said terms of sale must also specify the amount of the capital of any such corporation, and number of shares of capital stock which such corporation shall be authorized to issue, the percentage to be paid in cash by the subscribers on subscribing for such shares, the maximum amount

of the bonded indebtedness which such corporation be authorized to incur, and which may be secured by mortgage upon its property and franchises, and the rates of fares and freights which such corporation may charge and collect for the carriage of persons and property. But the rate of fare for any passenger on said railway from any point on the same northward or southward within the city of New York shall not exceed five cents under any provision of this act. The said board may, if it considers that the public interest requires it to do so, reject all bids and readvertise the said rights, privileges and franchises for sale, with the same or different terms of sale, as often as it may deem necessary in the interest of such city, and shall finally accept that bid which, under all circumstances in its opinion, is most advantageous to the public and such city; and no bid shall be accepted without the concurrent vote of six members of the board. The terms of sale on any such resale must contain all the provisions required by this act to be inserted in the original terms of sale. Such sale may be adjourned from time to time at the discretion of the board. All sales of such rights, privileges and franchises shall be made for a definite term of years, but the expiration of the term, if sold for a term of years, shall not impair any mortgage or other lien upon the property of such corporation or the rights of any creditor or creditors of such corporation; provided, however, that nothing herein contained shall be so construed as to extend the term for which such rights, privileges and franchises are sold.

(As amended by L. 1892, ch. 556; L. 1894, ch. 752, and L. 1895, ch. 519.)

§ 8. Resale of franchise after expiration of term — Purchasers.— Within one year, and not less than six months, prior to the expiration of any term for which such rights, privileges and franchises shall have been sold, said board shall proceed to resell the right to maintain and operate the said railway. Such sale shall be made in the manner prescribed for the original sale, and the board is empowered to make suitable provisions for securing to the corporation then operating such railway or railways suitable compensation for the railroad structure and appurtenances, and for any other property, real or personal, which the said corporation may own or of which it may be vested at the expiration of the term for which such rights, privileges and franchises were sold. Any corporation theretofore organized under the provisions of this act may be a purchaser on such resale; but if no such corporation be the purchaser, a new corporation shall be formed to maintain and operate said road in the manner prescribed for the organization of a corporation on the original sale, except that the plans and specifications according to which said railway has been constructed need not be set out at large, but may be referred to as forming part of the articles of association of said new corporation.

§ 9. Offices and employees — Preferences.— The said board may rent such offices and employ such engineers, attorneys and other persons, from time to time, as it may, in its discretion, deem necessary to the proper performance by it of its duties as in this act prescribed. It may sue in the name and behalf of the city for which it acts as a board. It may in the name of and in behalf of the said city bring action of specific performance or may apply by mandamus to compel the performance within its city by any corporation or person of any duty or obligation with reference to or arising out of the construction or operation of any railroad under, or by reason of, any grant made or right acquired under this act or the acts amendatory hereof or supplementary hereto, or out of or by reason of any contract made or authorized by any board of rapid transit commissioners within its city, or it may in behalf of and in the name of said city bring actions to recover damages for any violation of contract or duty, or for any wrong committed by any such corporation or person by reason of any non-performance or violation of duty under the provisions of this act, or under any contract or stipulation made in pursuance of any provisions of this act. Every action or proceeding brought by the said board, and every action or proceeding in which an injunction is had or sought against the board or the said city, or against any corporation or person who or which shall have entered into a contract under the provisions of this act, or any act supplementary hereto, or amendatory hereof, by reason of any act or thing done, proposed or threatened under or by virtue of any provision of this act, or any act supplementary hereto, or amendatory hereof, or is sought against any corporation or person claiming or claiming to act under any grant or franchise under this act, or any act supplementary hereto, or amendatory hereof, and every action or proceeding in which the constitutionality of any part of this act, or of any act supplementary hereto, or amendatory hereof, shall or may be brought in question, shall have a preference above all causes not criminal on the calendar of every court, and may be brought on for trial or argument upon notice of eight days for any day of any term on which the court shall be in session.

(As amended by L. 1892, ch. 556; L. 1894, ch. 752, and L. 1895, ch. 519.)

§ 10. Appropriations for board — Audit and payment of expenditures — Revenue bonds — Repayment of expenses — Compensation of commissioners.— The board of estimate and apportionment or other board or public body on which is imposed the duty, and in which is vested the power, of making apportionments of public moneys for the purposes of the city government in any city in which it is proposed to construct such railway or railways shall, from time to time, on requisition duly made by the board of rapid transit railroad commissioners, appropriate such sum or sums of money as may be requisite

and necessary to properly enable it to do and perform, or cause to be done and performed, the duties herein prescribed, and to provide for the compensation of such commissioners, and such appropriation shall be made forthwith upon presentation of a requisition from the board of rapid transit railroad commissioners, which shall state the purposes for which such moneys are required by the said board. In case the said board of estimate and apportionment or such other board or public body fail to appropriate such amount as the board of rapid transit railroad commissioners deem requisite and necessary, the said board of rapid transit railroad commissioners may apply to the general term of the supreme court, in the department in which the railway is to be or has been constructed, on notice to the board of estimate and apportionment, or such other board or public body aforesaid, to determine what amount shall be appropriated for the purposes required by this section, and the decision of said general term shall be final and conclusive; and no city shall be liable for any indebtedness incurred by the said board of rapid transit railroad commissioners in excess of such appropriation or appropriations. It shall be the duty of the auditor and comptroller of any such city, after such appropriations shall have been duly made, to audit and pay the proper expenditures and compensation of said commissioners upon vouchers therefor, to be furnished by the said commissioners, which payments shall be made in like manner as payments are now made by the auditor, comptroller, or other public officers, of claims against and demands upon such city; and for the purpose of providing funds with which to pay the said sums, the comptroller or other chief financial officer of said city is hereby authorized and directed to issue and sell revenue bonds of such city in anticipation of receipt of taxes, and out of the proceeds of such bonds to make the payments in this section required to be made. The amount necessary to pay the principal and interest of such bonds shall be included in the estimates of moneys necessary to be raised by taxation to carry on the business of said city, and shall be made a part of the tax levy for the year next following the year in which such appropriations are made. All expenses of the said board of rapid transit railroad commissioners, including the compensation of said commissioners, so incurred and paid by any city as in this section provided, and for which any city shall be liable, shall be repaid, with interest, by the bidder or bidders at the public sale of the rights, privileges and franchises, as in this act provided, in case said board shall so sell the same, whose bid shall be accepted by the board of rapid transit railroad commissioners, and the terms of such sale shall specify the time when such payment shall be made, as well as the amount thereof. The commissioners, other than the mayor and comptroller or other chief financial officer of such city, shall be paid a reasonable compensation for the duties performed by them from time to time, under the provisions of this act. The amount of such com-

pensation shall be determined by the general term of the supreme court in the department in which said city shall be located upon application by said board after notice to the mayor of such city.

(As amended by L. 1894, ch. 752.)

§ 11. Corporations, how organized — Articles of association — Subscriptions to stock — Meeting of subscribers.—A corporation or corporations to construct and operate such rapid transit railway or railways, and to enjoy and exercise the rights, privileges and franchises in this act provided for shall be created and organized in the manner following: Articles of association shall be duly signed and acknowledged by not less than twenty-five persons, and such articles shall set forth the name of the proposed corporation and duration thereof. Said articles must also state that they are made and filed under and in pursuance of this act for the purpose of taking and exercising the rights, privileges and franchises so purchased as aforesaid, according to the terms of sale; and such terms of sale and all plans and specifications must be made a part of said articles, annexed thereto and filed therewith. The said articles must also contain such other provisions as the said board may deem requisite and necessary, not inconsistent with the terms of sale or with this act. The said articles must be approved by said board, by the concurrent vote of six members, and its approval must be indorsed thereon and attested by the seal of the board and the signature of its presiding officer, and must then be filed in the office of the secretary of state, and a duly certified copy, or a duplicate thereof, must be filed in the office of the clerk of the county in which such railway or railways are to be constructed. Immediately after the articles of association shall have been so made, approved and filed, the board of rapid transit railroad commissioners shall cause books of subscription to the capital stock of any such corporation to be opened, and shall give public notice of the opening of such books and of the time and place at which subscriptions will be received; and when the full amount of such capital stock shall have been subscribed by not less than fifty persons, and such percentage of the amount subscribed as may have been fixed by the board in the terms of sale shall have been paid in, in cash, to such bank or trust company as the board may select, the said board shall call a meeting of the subscribers for the purpose of organizing the corporation, serving upon or mailing to each subscriber a notice of such meeting at least ten days before the time appointed for holding the same; and the person or persons whose bid shall have been accepted by the said board of rapid transit railroad commissioners shall, if they elect to become subscribers to the capital stock of such corporation, be entitled to a preference for themselves and their associates in subscribing for, and in the allotment of the shares of capital stock of such corporation.

(As amended by L. 1894, ch. 752, § 10.)

§ 12. Election of first directors — Adoption of by-laws.— At such meeting of subscribers thirteen directors of the corporation shall be elected, each of whom shall be a holder in his own right of at least one hundred shares of the capital stock of the corporation, and the board of rapid transit railroad commissioners shall appoint the the* inspectors of the first election. Each share of stock shall entitle the holder to one vote for each director. The directors so selected shall hold office for one year and until others are elected in their places. At such meeting by-laws must be adopted not inconsistent with this act, which by-laws shall, among other things, provide for:

1. The term of office of the directors elected at any subsequent meeting of stockholders, which term shall not exceed one year.

2. The manner of filling any vacancy which may occur in any office or in the board of directors.

3. The time and place of the annual meeting of stockholders.

4. The manner of calling and holding special meetings of stockholders.

5. The number of stockholders who shall attend either in person or by proxy, at any stockholders' meeting in order to constitute a quorum.

6. The officers of the corporation, the manner of their election by the directors, and their duties and powers, and among which officers there shall be included a president, a secretary and a treasurer.

7. The manner of electing or appointing inspectors of election.

8. The manner of amending the by-laws.

The by-laws may also provide for the forfeiture of shares for the non-payment of calls and for such other matters as may be deemed proper by the board of rapid transit railroad commissioners and they must be approved by a resolution of said board.

§ 13. Record of proceedings — Certificate of organization — Record and certificate to be filed — Deposits.— Within ten days after the said subscribers' meeting a record of the proceeding thereof, containing a copy of the subscription list, a copy of the by-laws adopted, and the names of the directors chosen, shall be prepared and duly certified by the person presiding over, and the person acting as secretary of said meeting. There shall be attached thereto a certificate of the board of rapid transit railroad commissioners, attested by its seal and the signature of its presiding officer, that said board has approved the by-laws adopted at the subscribers' meeting, and that said corporation has been organized in accordance with the provisions of this act. The said record and certificate shall be filed by said board in the office of the secretary of state, and a duly certified copy or duplicate thereof shall be filed in the office of the clerk of the county in which said railway or railways are to be built, and thereupon and upon the payment

* So in the original.

to the state treasurer of a tax of one-eighth of one per centum of the par value of the capital stock of said corporation, such corporation shall be deemed to be fully organized. A copy of said certificate, duly certified by the secretary of state, or by the county clerk in whose office it is filed, shall be presumptive evidence of the due organization of such corporation in all courts and proceedings. Upon the production of the certified copy of said certificate, and upon the order of such corporation, the bank or trust company in which the percentage of subscriptions to the capital stock shall have been deposited, shall pay over to any such corporation the amount of such deposit, and said corporation shall repay to the purchaser or purchasers at the sale provided for in section seven of this act, the expenses paid by him or them to the city pursuant to the provisions of the terms of sale, with interest to the date of such repayment.

§ 14. Modification of plans—Certificate thereof and filing of same.—The said board of rapid transit railroad commissioners, if, in their judgment, the public interest requires, may, at any time after the full organization of any such corporation, by the concurrent vote of six members, authorize such corporation to alter or add to the detailed plans and specifications contained in its articles of association, provided the plans and specifications as so modified do not change the route or routes of said railway and be not inconsistent with the general plan of construction adopted under the provisions of section four of this act, and provided also such modifications be first approved by a vote of two-thirds of the directors of said corporation present and voting at any special meeting duly called for the purpose, by written notice stating the nature of the business to be transacted at said meeting. When such authorization by the board of rapid transit railroad commissioners shall have been given, a certificate shall be prepared, and acknowledged by the president and a majority of the directors of said corporation, stating the nature of the modification, and that the same has been approved by the board of directors in the manner above set forth, to which certificate there shall be attached a copy of so much of the original plans and specifications as are to be affected by the modification, and also the plans and specifications as modified. There shall also be contained in such certificate a declaration of the approval of said board of rapid transit railroad commissioners, attested in the same manner as the certificate of full organization. The said certificate, plans and specifications shall then be filed in the office of the secretary of state, and a certified copy or duplicate thereof shall be filed in the office of the clerk in which the articles of association are filed. And thereupon said corporation shall be authorized to construct its railway or railways and appurtenances in accordance with such modified plans and specifications.

(As amended by L. 1894, ch. 752, § 10.)

§ 15. Principal office and place of taxation —Exemption.—Every corporation organized under this act shall have its principal office and be taxed on its property in the city where its railway or railways are situated. But no taxes of any kind or nature shall be levied or imposed upon that portion of any railway constructed under this act which is in process of construction, and not in actual operation for the transportation of passengers or freight, but this exemption from taxation during construction shall not apply to any portion or portions of said railway after the date on which said portion or portions shall have been opened to the public for the transportation of passengers or freight.

(As amended by L. 1892, ch. 556.)

§ 16. Board of directors—Vacancies and qualifications—Exhibition of books.—The affairs of said corporation shall be managed by a board of thirteen directors, who shall be chosen annually, by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue to be directors until others are elected in their places. In the election of directors, each stockholder shall be entitled to one vote for each share of stock held by him. Vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation. No person shall be a director unless he shall be a stockholder owning one hundred shares of stock absolutely in his own right, and qualified to vote for directors at the election at which he shall be chosen. At every election of directors the books and papers of such corporation shall be exhibited to the meeting, provided a majority of the stockholders present shall require it.

§ 17. Payment of subscriptions to stock.—The directors shall require the subscribers to the capital stock of the company to pay the amount by them respectively subscribed in money at such times and in such installments as they may deem proper, not inconsistent with the by-laws and the articles of association.

§ 18. Personal liability of stockholders—Notice and commencement of action.—Each stockholder of any corporation formed under this act shall be individually liable to the creditors of such corporation, to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such corporation, until the whole amount of the capital stock so held by him shall have been paid to the corporation; and all the stockholders of any such corporation shall be jointly and severally liable for the debts due or owing to any of its laborers and servants, other than contractors, for personal services, for thirty days' service performed for such corporation, but shall not be liable to an action therefor before an execution or executions shall be

returned unsatisfied in whole or in part against the corporation, and the amount due on such execution or executions shall be the amount recoverable, with costs, against such stockholders; before such laborer or servant shall charge such stockholder for such thirty days' service, he shall give him notice in writing within twenty days after the performance of such service, that he intends so to hold him liable, and he shall commence such action therefor within thirty days after the return of such execution unsatisfied, as above mentioned; and every such stockholder against whom any such recovery by such laborer or servant shall have been had, shall have a right to recover the same of the other stockholders in said corporation, in ratable proportion to the amount of the stock they shall respectively hold.

§ 19. Transfer of stock.—The stock of every corporation formed under this act shall be deemed personal estate, and shall be transferable in the manner prescribed by the by-laws of the company, but no share shall be transferable until all previous calls thereon shall have been fully paid in.

§ 20. Increase or reduction of capital—Statement to be made and filed.—Any corporation formed under this act may increase or reduce its capital stock from time to time upon obtaining the approval of the board of rapid transit railroad commissioners by a concurrent vote of six members thereof. Such increase or reduction must be approved by a vote in person, or by proxy, of two-thirds in amount of all the stockholders of the corporation, at a meeting of such stockholders called by the directors of the corporation for that purpose, by a notice in writing to each stockholder, to be served on him in the manner provided for service of the notice of the subscribers' meetings provided for in section eleven of this act. Such notice shall state the time and place of the meeting, and its object, and the amount to which it is proposed to increase or reduce the capital stock. A statement of the increase or reduction shall be signed by the president and a majority of the directors and shall be filed in the office of the Secretary of State and of the clerk of the county in which the original articles of association are filed. There must be attached thereto a certificate of the approval of said board of rapid transit railroad commissioners attested in the same manner as the certificate of full organization.

(As amended by L. 1894, ch. 752, § 10.)

§ 21. Liability of certain holders of stock.—No person holding stock in any such corporation, as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as a stockholder of such corporation; but the person pledging such stock shall be considered as holding

the same, and shall be liable as a stockholder accordingly; and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be liable in like manner, and to the same extent, as the testator or intestate or the ward or person interested in such trust fund would have been if he had been living and competent to act, and held the same stock in his own name.

§ 22. Liability of corporation to employees of contractors—Notice to be given.—As often as any contractor for the construction of any part of a railway, which is in progress of construction under the provisions of this act, shall be indebted to any laborer for thirty or any less number of days' labor performed in constructing said road, such laborer may give notice of such indebtedness to said corporation in the manner herein provided; and said corporation shall thereupon become liable to pay such laborer the amount so due him for such labor, and an action may be maintained against said corporation therefor. Such notice shall be given by said laborer to said corporation within twenty days after the performance of the number of days' labor for which the claim is made. Such notice shall be in writing, and shall state the amount and number of days' labor, and the time when the same was performed and the name of the contractor from whom due, and shall be signed by such laborer or his attorney, and shall be served on an engineer, agent or superintendent employed by such corporation having charge of the section of the road on which such labor was performed personally, or by leaving the same at the office or usual place of business of such engineer, agent or superintendent with some person of suitable age. But no action shall be maintained against any corporation under the provisions of this section, unless the same be commenced within thirty days after notice is given to such company by such laborer as above provided.

§ 23. Acquiring and holding of real estate.—Every such corporation shall have the right to acquire and hold such real estate or easement or other interest therein, or rights appertaining thereto, as may be necessary to enable it to construct, maintain and operate the said railway, or railways, and such as may be necessary for stations, depots, engine-house, car-houses, machine-shops, and other appurtenances specified in the articles of association; and in case any such corporation can not agree with the owner or owners of such property it shall have the right to acquire title to the same in pursuance of the terms of and in the manner prescribed in title one of chapter twenty-three of the Code of Civil Procedure, known as the condemnation law.

§ 24. **Corporate powers.**—Every corporation formed under this act shall have power:

1. To take and hold such voluntary grants of real estate and other property as shall be made to it, to aid in the construction, maintenance and accommodation of its railway or railways, but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.

2. To purchase, lease, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railway or railways, and the stations or other accommodations necessary to accomplish the objects of its incorporation; but nothing herein contained shall be held as repealing or in any way affecting the act, entitled "An act authorizing the construction of railroads upon Indian lands," passed May twelve, eighteen hundred and thirty-six.

3. To cross, intersect, join and unite its railway or railways with any other railway at any point on its route and upon the grounds of such other railway company, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the objects of its connections. And every corporation whose railway is or shall be hereafter intersected by any new railway, shall unite with the owners of such new railway in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations can not agree upon the amount of compensation to be made therefor, the same shall be ascertained and determined by commissioners to be appointed by the court, in the manner provided in this act in respect to acquiring title to real estate. And if the two corporations cannot agree upon the points and manner of such crossings and connections, the board of rapid transit railroad commissioners shall determine the same on the application of either corporation.

4. To take and convey persons and property on its railway or railways by the power or force of steam, or by any motor other than animal power, and to receive compensation therefor not inconsistent with the provisions of this act, and the terms of sale under which the said corporation shall have acquired its rights, privileges and franchises.

5. To enter upon and underneath the several streets, avenues, public places and lands designated by the said board of rapid transit railroad commissioners, and enter into and upon the soil of the same; to construct, maintain, operate and use, in accordance with the plan adopted by said board, a railway or railways upon the route or routes and to the points decided upon, and to secure the necessary foundations and erect the columns, piers and other structures which may be required to secure safety and stability in the construction and maintenance of the railways constructed upon the plan adopted by the said board, and which may be necessary for operating the same, except that nothing in this act shall authorize the construction of a railway crossing the track of

any steam railway in actual operation at the grade thereof, and it shall be lawful to make such excavations and openings along the route through which such railway or railways shall be constructed as shall be necessary from time to time; in all cases the surface of said streets around such foundations, piers and columns shall be restored to the condition in which they were before such excavations were made, as near as may be, and under the direction of the proper local authorities; and in all cases the use of the streets, avenues, places and lands designated by the said board, and the right of way through the same, for the purpose of a railway or railways, as herein authorized and provided, shall be considered, and is hereby declared, to be a public use, consistent with the uses for which the roads, streets, avenues and public places are publicly held; but no such corporation shall have the right to acquire the use or occupancy of public parks or squares in such county, or the use or occupancy of any of the streets or avenues, except such as may have been designated for the route or routes of such railway, and except such temporary privileges as the proper authorities may grant to such corporations to facilitate such construction.

6. From time to time to borrow such sums of money as may be necessary for completing and finishing or operating their railroad, and to issue and dispose of their bonds for such purposes; but the amount of such bonds outstanding at any one time shall not exceed the amount limited by the articles of association.

(As amended by L. 1892, ch. 556.)

§ 25. Employees to wear badges.—Every conductor, baggage master, engineer, brakeman or other servant of any railroad corporation employed in a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge, which shall indicate his office, and the initial letter of the style of the corporation by which he is employed. No conductor or collector, without such a badge, shall be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office; and no officer or servant without such badge shall have authority to meddle or interfere with any passenger, his baggage or property.

§ 26. Conveying United States mails—Extra trains therefor.—Any corporation or person operating a railroad under any provision of this act or of any act supplementary hereto or amendatory hereof shall, when applied to by the postmaster-general, convey the mails of the United States on their road or roads respectively; and in case the parties can not agree as to the rate of transportation therefor, and as to the time, rate of speed, manner and conditions of carrying the same, it shall be lawful for the governor of this state to appoint three commissioners, who, or a majority of them, after fifteen days' notice in

writing of the time and place of meeting to the corporation, shall determine and fix the prices, terms and conditions aforesaid; but such price shall not be less for carrying said mails in the regular passenger trains than the amount which such corporation would receive as freight on a like weight of merchandise transported in their merchandise trains, and a fair compensation for the post-office car. And in case the post-master-general shall require the mail to be carried at other hours, or at a higher speed than the passenger trains are run, the corporation shall furnish an extra train for the mail and be allowed an extra compensation for the expenses and wear and tear thereof, and for the service to be fixed as aforesaid.

(As amended by L. 1895, ch. 519.)

§ 27. Ejection of passengers from cars.—If any passenger shall refuse to pay his fare, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, on stopping the train.

§ 28. Running of cars and conveyance of freight and passengers.—Every such corporation shall start and run its cars for the transportation of passengers and property at regular times, to be fixed by public notice; and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junction of other railroads, and at usual stopping places established for receiving and discharging way passengers and freight for that train; and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the freight or fare legally authorized therefor; and shall be liable to the party aggrieved in an action for damages, for any neglect or refusal in the premises.

§ 29. Intoxication of employees.—If any person shall, while in charge of a locomotive engine running upon the railway of any such corporation, or while acting as the conductor of a car or train of cars on any such railroad, be intoxicated, he shall be deemed guilty of a misdemeanor.

§ 30. Willful injury to property.—If any person or person shall willfully do, or cause to be done, any act or acts whatever, whereby any building, construction or work of or on any part of any railroad either constructed or operated under any provision of this act or of any act supplementary hereto or amendatory hereof, or under any provision of any contract made under this act or any act supplementary hereto

or amendatory hereof, or any engine, machine or structure, or any matter or thing appertaining to the same, shall be stopped, obstructed, impaired, weakened, injured or destroyed, the person or persons so offending shall be guilty of a misdemeanor, and shall forfeit and pay to the owner of such building, construction, works, engine, machine, structure, matter or thing treble the amount of damages sustained in consequence of such offense.

(As amended by L. 1895, ch. 519.)

§ 31. Dissolution by legislature.—The legislature may, at any time, annul or dissolve any corporation formed under this act; but such dissolution shall not take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred.

§ 32. Power to fix continuous routes and extend lines—Straightening and improving of roads—Tunnel railroads.—The said board of rapid transit railroad commissioners may also from time to time, as in this section hereinafter provided, with the approval of the board of estimate and apportionment, or other analogous local authority of such city, grant a right or rights, franchise or franchises or enter into a contract or contracts, upon application to said board of any railroad corporation, now or hereafter incorporated, for the purpose of constructing and operating a tunnel railroad or railroads from an adjoining state under the North or Hudson or Harlem river to a terminus within such city; or under the North or Hudson river and thence transversely across and under the surface of the borough of Manhattan and thence under the East river by the shortest practicable route; such railroad or railroads to be connected with some trunk line railroad or railroads whose terminus or termini are in this or an adjoining state, thereby forming a continuous line for the carriage of passengers and property between a point or points within such adjoining state and a point or points within the said city, provided such purpose is declared in the certificate of incorporation of such corporation. A similar grant may be made, or a similar contract or contracts entered into, upon the application of a railroad corporation, owning or actually operating a trunk line railroad whose terminus or termini are within such city, or of a railroad corporation owning or actually operating, or by the certificate of the board of rapid transit railroad commissioners hereinafter in this section mentioned required to own or actually operate, a railroad wholly or partly within said city and engaged or intended, and in said certificate so recited and required, to be, in interstate commerce in connection with a trunk line railroad and which shall have, or be required by such certificate to have a terminus or termini in said city, for the purpose of constructing and

operating a railroad or railroads from such terminus or termini by the shortest practicable route to and under or over the East river or the North or Hudson river, or the Harlem river, to any point in this or an adjoining state, or to connect such terminus or termini with the railroad or terminus of any other such railroad or trunk line railroad in this State or to straighten or improve the grade or alignment of any such railroad or more directly connect any points thereon. If and when in the judgment of said board the public interests so demand, the said board may, with like approval, by the concurrent vote of six of its members fix and determine the route or routes by which any such railroad corporation making such application may so establish and construct or so extend its lines into or within said city, and may authorize any such railroad corporation to construct and operate any such railroad or connecting railroad under any lands, streets, avenues, waters, rivers, parkways, highways or public places in the said city, and also in the case of any such railroad or connecting railroad which is, or by the terms of the said certificate of the said board of rapid transit railroad commissioners is required to be, operated or used as a part of an interstate trunk line, to construct and operate the same over and across any such lands, waters, rivers, streets, avenues, parkways, highways or public places in the said city, but not over and lengthwise of any streets, avenues or highways, with all necessary sidings, platforms, stations, facilities for access to the surface and other appurtenances and with the right to emerge to the surface upon private lands at the termini, and to transport over the same passengers or freight or both, and to run over the same either passenger trains or freight trains or mixed trains. The said board shall, with like approval, fix and determine the locations and plans of construction of the railroad or railroads upon such route or routes, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by the railroad corporation to which the grant shall be made, or with which the contract shall be entered into, and such other terms, conditions and requirements as to the said board may appear just and proper,—provided, however, that every such grant shall be made and every such contract entered into upon the condition that the railroad corporation to which the grant shall be made or with which the contract shall be entered into shall, from the time of the commencement of the operation of any such railroad, annually pay to the said city a sum or rental, and that the amount of such sum or rental for a period of not more than twenty-five years, beginning with such operation of any such railroad, shall be prescribed by the said board in such grant or contract and that every such grant or contract shall provide for the readjustment of the amount of such sum or rental at the expiration of the period for which the same shall be so prescribed and for readjustment from time to time in the future of

the amount of such annual payment at intervals each of not more than twenty-five years. A certificate shall be prepared by the said board, attested by its seal and the signature of its presiding officer, setting forth in detail the action taken and grant made or contract entered into by the said board with respect to such railroad or railroads and the terms, conditions and requirement aforesaid, including provisions as to the said annual payments and the future readjustments thereof. A like certificate shall be prepared in like manner upon every modification of the terms of the grant or contract as hereinafter provided. Each such certificate shall prescribe the terms and conditions of the readjustments of such annual payments and may provide for the determination of such amount upon such readjustments by arbitration or by the supreme court. Such certificate shall be delivered to said railroad corporation upon the receipt by said board of a written acceptance of the terms, conditions and requirements of the grant or contract, duly executed by said railroad corporation, so as to entitle it to be recorded. The said certificate shall be filed in the office of the secretary of state, and a duly certified copy thereof shall be filed in the office of the clerk of the county in which the said city is situated, and thereupon, and upon fulfillment by such railroad corporation, so far as it relates to such railroad or railroads, of such of the requirements and conditions as are necessary to be fulfilled in such cases, under section eighteen of article three of the constitution of this state, and upon fulfillment by such railroad corporation of such other terms, conditions and requirements enumerated in said certificate, as the said board may require to be fulfilled as a condition precedent to commencing said work, said railroad corporation shall in such cases possess in addition to its already existing franchises all the powers conferred by this act upon corporations specially formed thereunder, with respect to its railways authorized to be constructed as aforesaid, and when any route or routes, rights or franchises, shall be so fixed and determined, and a certificate as aforesaid shall have been duly filed, such railroad corporation may construct the same with all the rights, and with like effect as though the same had been a part of the original route of its railroad then in actual operation or as may be provided in said certificate but in every case subject to all the provisions and conditions of the said certificate. Every certificate prepared by the board of rapid transit railroad commissioners as aforesaid when delivered to and accepted by such railroad corporation, shall be deemed to constitute a contract between the said city and said railroad corporation, according to the terms of the said certificate; and such contract shall be enforceable by the said board acting in the name of and in behalf of the said city or by the said corporation according to the terms thereof, but subject to the provisions of this act. The terms of such contract may from time to time, with like approval and with the con-

sent of such corporation, be modified by the board of rapid transit railroad commissioners by the vote of six of its members. But the construction and operation of such railroad or railroads are hereby authorized only upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon, above or under which it is proposed to construct or operate the same, be first obtained, provided that such local authorities shall, upon the presentation to them of any such grant or contract, without requiring the execution of any other agreements than those herein provided for, either approve or disapprove the same; and every such approval, shall be and be deemed to be, free of all limitations except those contained in this act or the constitution of the state. In case the consent of such property owners cannot be obtained, the appellate division of the supreme court in the department in which such railroad or railroads are proposed to be constructed, may, upon application, in the same manner and on the same notice specified in section five of this act, appoint three commissioners, who shall determine after a hearing of all parties interested, whether the same ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of such property owners. Nothing in this act contained shall be construed as interfering in any way with the jurisdiction, powers and duties of the board of railroad commissioners of the state of New York, nor shall any grant or contract be made hereunder affecting in any way the liabilities and obligations of the grantee or contracting railroad corporation with reference to taxation for state or local purposes. The state of New York shall not be liable for injuries to persons or property in connection with any railroad or other construction which may be authorized under the provisions of this act, nor shall the state of New York be liable for any damages in any event for any act or omission of the board of rapid transit railroad commissioners.

(As amended by L. 1895, ch. 519; L. 1902, ch. 584; L. 1906, ch. 472; L. 1906, ch. 606.)

§ 32-a. Power as to connections — Additional tracks and facilities — Plans of construction — Compensation — Certificates — Consents.—The said board of rapid transit railroad commissioners may also from time to time, with the approval of the board of estimate and apportionment, upon application of any person, firm or corporation owning, leasing, constructing, or actually operating a railroad wholly or in part within the limits of the city in which the said board has power to act, if in the judgment of said board the public interests so demand, by the concurrent vote of six of the members of said board, fix and determine the route or routes by which any such person, firm

or corporation may connect with other railways, or the stations thereof, or with ferries, or may extend his or its lines within said city, and may with like approval authorize any such person, firm or corporation to lay an additional track or tracks on, above, under or contiguous to a portion of the whole of the route or routes of his or its railway or railways within said city and to acquire terminal or other facilities necessary for the accommodation of the travelling public on any street or place except the place known as Battery park on which said railway shall be located; and may also with like approval authorize any such person, firm or corporation to lay his or its tracks and operate his or its railway to any terminal or terminals within the said city, and to transport over the same passengers or freight or both, and to run over the same either passenger trains or freight trains or mixed trains; and the said board shall with like approval fix and determine the locations and plans of construction of the railways upon such route or routes and of such track and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by said person, firm or corporation, and such other terms, conditions and requirements as to the said boards may appear just and proper, provided, however, that every such determination, authorization and license shall be made upon the condition that such person, firm or corporation shall from the time of the commencement of the operation of any such railway or track or tracks under such determination, authorization or license, annually pay to the said city a sum or rental, and that the amount of such sum or rental for a period of not more than twenty-five years, beginning with such operation of any such railway, track or tracks, shall be prescribed by the said board in such determination, authorization and license, and that every such determination, authorization and license shall provide for the readjustment of the amount of such sum or rental at the expiration of the period for which the same shall be so prescribed and for readjustment from time to time in the future, to the end of the period of renewal, if any, of the amount of such annual payment at intervals each of not more than ten years. No such determination, authorization or license shall be made for a longer period than twenty-five years but may provide for renewal or renewals thereof not to exceed twenty years in the aggregate. A certificate shall be prepared by the said board, attested by its seal and the signature of its presiding officer, setting forth in detail the action taken by the said board with respect to such connecting or extended route or routes and such tracks and facilities, and the terms, conditions and requirements aforesaid, including provisions as to the said annual payments and the future readjustments thereof. A like certificate shall be prepared in like manner upon every modification or renewal of the terms of the contract as hereinafter provided. Every such certificate shall prescribe the terms and conditions of the read-

justments of such annual payments and may provide for the determination of such amount upon such readjustments by arbitration or by the supreme court. Such certificate shall be delivered to said person, firm or corporation upon the receipt by said board of a written acceptance of said terms, conditions and requirements, duly executed by said person, firm or corporation, so as to entitle it to be recorded. The said certificates shall be filed in the office of the secretary of state, and a duly certified copy thereof shall be filed in the office of the clerk of the county in which the said city is situated, and thereupon, and upon fulfillment by such person, firm or corporation, so far as it relates to such connections, additional track or tracks, or facilities, of such of the requirements and conditions as are necessary to be fulfilled in such cases, under section eighteen of article three of the constitution of this state, and upon fulfillment by such person, firm or corporation of such other terms, conditions and requirements enumerated in said certificate, as the said board may require to be fulfilled as a condition precedent to commencing said work, said person, firm or corporation shall in such cases possess in addition to existing franchises all the powers conferred by this act upon corporations specially formed thereunder, with respect to his or its railways authorized to be constructed as aforesaid, and when any route or routes, additional track or tracks, or terminal or other facilities, shall be so fixed and determined, and a certificate as aforesaid shall have been duly filed, such person, firm or corporation may construct the same with all the rights, and with like effect as though the same had been a part of the original route of his or its railway then in actual operation or in process of construction, except that no franchise, right or authority shall be granted under this section to extend any railway, make any connections, lay any additional track or tracks or acquire any terminal or other facilities for a longer period than the original grant, franchise or contract of the railway to which such extension, connection, additional track or tracks, or terminal or other facilities are added. The certificate or certificates prepared by the board of rapid transit railroad commissioners as aforesaid when delivered to and accepted by such person, firm or corporation, shall be deemed to constitute a contract between the said city and said person, firm or corporation according to the terms of the said certificate; and such contract shall be enforceable by the said board acting in the name of and in behalf of the said city or by the said person, firm or corporation according to the terms thereof, but subject to the provisions of this act. The terms of such contract may from time to time, with the consent of such person, firm or corporation be modified by the board of rapid transit railroad commissioners by the vote of six of its members. But the construction and operation of such connections, extensions, additional track or tracks, or facilities, are hereby authorized only upon the condition that the consent of the

owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon, above or under which it is proposed to construct or operate the same, be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court in the district in which they are proposed to be constructed, may, upon application, in the same manner, and on the same notice specified in section five of this act, appoint three commissioners, who shall determine after a hearing of all the parties interested, whether the same ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners. Every such certificate granting any franchise, right or authority as aforesaid shall provide that upon the termination thereof all the rights of property of the grantee in the streets, avenues, parkways, highways and public places shall cease and terminate without compensation and shall further provide that upon such termination of such franchise, right or authority the plant and structure together with the appurtenances thereto, of the grantee constructed pursuant to such certificate, except rolling stock and other movable equipment, shall become the property of the city without further or other compensation to the grantee; but such certificate may provide that upon such termination there shall be a fair valuation of the rolling stock and other movable equipment which shall be and become the property of the city on the termination of the grant on paying the grantee such valuation. The provisions of this section shall apply to any railroad or railroads constructed, constructing or contracted for under the provisions of section thirty-four of this act, and to any person, firm or corporation constructing or operating such railroad or railroads.

(Added by L. 1906, ch. 472.)

§ 33. Removal of tracks of railways by contractor constructing railway authorized — Restoration — Damages — Tramways.— Whenever or whenever the route selected by the said board of rapid transit railroad commissioners for the construction of such railway shall intersect, cross or coincide with any railway track or tracks occupying the surface of any street or avenues, or the construction or operation of said railway shall interfere with any pipes, sewers, subways, or underground conduits or ways, any corporation organized under this act, or any contractor or person constructing any railway or part of a railway under any contract made with the board of rapid transit railroad commissioners, is hereby authorized, for the purpose of constructing the said work to remove the track or tracks of any such surface railway or railways, or any such pipes, sewers, subways, or underground conduits or ways, but the same shall be done in such manner as to interfere as little as possible with the practical operation or workings of

such surface railway or railways, or the works or business of the owners of any such pipes, sewers, subways, or underground conduits or ways, and upon the construction of such railways built under and in conformity with the provisions of this act, where such removals or changes have been made, said track or tracks, pipes, sewers, subways or underground conduits or ways shall be restored as nearly as may be to the condition in which they were previous to the construction of any such railway built under the provisions of this act, and any damages which such company or companies or owners may sustain shall be ascertained by a commission to be appointed the same as in the case where lands are taken for the purpose of a railway route or routes as hereinbefore provided in this act. For the purpose of the construction or operation of any railway under the provisions of this act, the board of rapid transit railroad commissioners may remove or cause to be removed, any pipes, sewers, subways or underground conduits or ways underneath any street, highway, park, or public place; provided, however, that the same shall be replaced as soon as practicable, either in the same position as before or in a secure and convenient position underneath such street, highway or public place, or underneath such other street, highway or public place as may be approved by the head of the department of public works of the city. Provided, however, that nothing in this section contained shall authorize the permanent removal from any street, highway, park or public place of any subways or conduits for the reception of electrical conductors which shall have been placed in such street, highway or public place prior to the construction of the rapid transit railroad, without the consent of the owner and lessee of such subway or conduit. All such removals and restorations shall be made at the proper cost and charge of such corporation, contractor or person as may have made such removals, but subject to the provisions of its, his, or their contract, if any, with the board of rapid transit railway commissioners. Nothing contained in this act shall authorize any corporation formed thereunder to use the tracks of any horse railway. For the purpose of facilitating construction, and to diminish the period of occupancy of any street for the transportation of material, any contractor acting under a contract made in pursuance of this act, or of any act supplementary hereto or amendatory hereof, may, with the approval of the board of rapid transit railroad commissioners, lay upon or over the surface of any street, temporary tramways, to be used only for the removal of excavated materials or the transportation of material for use in the construction; provided, however, that any such tramway shall be forthwith removed upon the direction of the board of rapid transit railroad commissioners; and provided, further, that this provision shall not be construed to authorize the construction or operation of any street railroad or to grant to any

corporation, association or individual the right to lay down railroad tracks.

(As amended by L. 1895, ch. 519, L. 1896, ch. 729, and L. 1904, ch. 564.)

§ 34. Construction of railway by city—Powers of board in cities formed by consolidation—Construction contracts.—In case the people shall determine by vote, as provided in sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, that any such railway or railways shall be constructed for and at the expense of such city, then and in that event it shall be the duty of said board to consider the routes, plans and specifications, if any, previously laid out and adopted by them or their predecessors, and for which the consents have been obtained referred to in section five of this act; and either to proceed with the construction of such railway or railways, and provide for the operation of the same, as hereinafter provided, or to change and modify the said routes, plans or specifications in such particulars as to said board may seem to be desirable, or from time to time and with or without reference to former routes or plans to adopt other or different or additional routes, plans and specifications for such railway or railways, provided always, that in all cases in which any such change or modification shall be of such character as to require the consents thereto referred to in section five of this act; and in all cases where other or different routes or general plans may have been so adopted the said board shall proceed to secure the consents required to be obtained by section five of this act as herein set forth. If any city has been or shall have been formed by the union or consolidation of one or more cities and other territory, and if in or for one of such cities so consolidated or united there shall have been a board of rapid transit commissioners as provided in this act the board of rapid transit railroad commissioners for the said city formed by such union or consolidation shall have for and within such city so formed all the powers, and be subject to all the duties and responsibilities, which at the time of such union or consolidation belonged to the board of rapid transit railroad commissioners of the former city so as aforesaid possessing such board for or in or with respect to such former city. If in such former city the vote of the qualified electors thereof shall have been for municipal construction of rapid transit road as prescribed in sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, then the system of municipal construction of rapid transit railways provided for in this act and all of the provisions with respect thereto in this act contained shall be applicable to, and in full force within, all the districts or boroughs and throughout the entire area of the said city formed by such union or consolidation. The board of rapid transit railroad commissioners for any city shall, prior to the time of the final

grant of any franchise under the provisions of this act or the making of a contract for construction of any railroad under the provisions of this act have power to rescind and revoke any resolution or resolutions of such board adopting any routes or general plan for a rapid transit railroad adopted by such board and, in the discretion of such board, in lieu thereof to adopt new routes and general plan. Every such rescindment or revocation which shall have been heretofore made shall be deemed to have been lawful and authorized by this act as the same was prior to the present amendment hereof. As soon as such consents, where necessary, shall have been obtained for any rapid transit railroad or railroads, and the detailed plans and specifications have been prepared as provided in section six of this act, the said board, for and in behalf of said city, shall enter into a contract with any person, firm or corporation, which in the opinion of said board shall be best qualified to fulfill and carry out said contract, for the construction of such road or roads, including such galleries, ways, subways and tunnels for subsurface structures, as said board may include in the plans for such road or roads under the authority of section six of this act; upon the routes and in accordance with the plans and specifications so adopted, for such sum or sums of money, to be raised and paid out of the treasury of said city, as hereinafter provided, and on such terms and conditions, not inconsistent with the aforesaid plans and specifications, as said board shall determine to be best for the public interests. The sum or sums of money to be paid for the construction of such road or roads shall be separately stated in the contract from the sum or sums to be paid for any galleries, ways, subways or tunnels for subsurface structures, the construction of which is provided for in such contract. And said board may in any case contract for the construction of the whole road, or all the roads provided for by the aforesaid plans in a single contract, or may by separate contracts, executed from time to time, or at the same time, with one or more such persons, firms or corporations, provide for the construction of parts of said road or roads or for the construction at first of two or more tracks over a part or parts of such road or roads and afterwards of one or more additional tracks over a part or parts of such road or roads as the necessities of said city and the increase of its population or the advantageous and economical performance of the work may in the judgment of said board require. The board may also, in a contract for a part of any such rapid transit railroad, insert a provision that, at a future time, upon the requirement of the board, the contractor shall construct the remainder or any part of the remainder of said road, as the growth of population or the interests of the city may, in the judgment of the board, require, and may, in such contract, insert a provision of a method for fixing and ascertaining at such future time the amount to be paid to the contractor for such additional construction, and to the end of such ascer-

tainment, may provide for arbitration or for determination by court of the amount of such compensation, or of any other details of construction which shall not be prescribed in the contract, but which shall be deemed necessary or convenient by said board. Any such contract may provide, if the public interest shall, in the opinion of the board, justify the provision, that the construction of any section or portion of the railroad included in such contract may, with the consent of the board, be suspended during the term of operation of the railroad as hereinafter mentioned, or any part of such term; provided that during such term or part of term there shall be available for use, in lieu of such portion of the road, a railroad or a portion or section thereof, which shall, with the railroad or portion of railroad constructed under such contract form a continuous and convenient route. Any such contract may be made for the construction of said road in sections, or for the construction of any section or sections thereof; and, except as herein otherwise provided, every such contract shall specify when the construction of the railroad or the section or sections thereof included therein shall be commenced in each case, and, in each case, the date of completion. The said board may by any such contract determine when and how the work of construction of the rapid transit railroad or railroads included therein shall proceed. The said board of rapid transit railroad commissioners may also provide for the equipment at public expense of such railroad or railroads in connection with the construction thereof, and may include in any contract for construction authorized by this act provision for the equipment, or any part thereof, of such railroad or railroads, but may make a separate contract or contracts for the whole or any part of such equipment with the constructing contractor or contractors or any other responsible persons, firms or corporations.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519; L. 1896, ch. 729; L. 1900, ch. 616; L. 1902, ch. 544; L. 1905, ch. 599; L. 1906, ch. 472.)

§ 34-a. Contracts for equipment, maintenance and operation — Rates of fare — Rental — Lien of city — Default in payment — Liability of bondsmen — Power of corporations.—The board of rapid transit railroad commissioners shall, subject to the approval of the board of estimate and apportionment, or other analogous local authority of such city, have full power and authority to provide for the maintenance, supervision, care and operation of the railroad or railroads, including the aforesaid galleries, ways, subways and tunnels for subsurface structures and all other appurtenances, constructed or to be constructed for and at the expense of such city pursuant to the provisions of this chapter, and may, with like approval, enter into a contract with any person, firm or corporation, who or which in the opinion of said board of rapid transit railroad commissioners shall be best quali-

fied to fulfill and carry out said contract, for the equipment, or any part thereof not provided for pursuant to the next preceding section of this act, of such road or roads, at his or its own cost and expense, and for the maintenance and operation of such road or roads for a term of years to be specified in said contract and not to exceed twenty years. Every such contract shall contain such terms and conditions as to the rates or fare to be charged and the character of services to be furnished and otherwise as said board of rapid transit railroad commissioners shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board, with like approval; provided, that in case different parts of a road shall be constructed at different times or at intervals of time, or if the contract shall provide for the use by the contractor of an existing railroad as part of a continuous route as aforesaid, then and in any such case the board of rapid transit railroad commissioners may, in its discretion, prescribe periods for the operation of the different parts of said road so that at one period of time in the future the board may be enabled to make a single operating contract or lease of the entire road. Every such contract shall further provide that the person, firm or corporation so contracting to equip, maintain and operate said road shall annually pay into the treasury of said city, as rental for the use of said road, a sum which shall not, except as hereinafter provided, be less than the annual interest upon the bonds to be issued by said city for the construction and equipment of said road as hereinafter provided for, and in addition to said interest, a further sum which shall be equal to a percentage of not less than one per centum upon the whole amount of said bonds; provided, that in estimating such annual interest and additional percentage there shall be deducted from the amount of said bonds the amount thereof issued to pay for rights, terms, easements, privileges or property other than lands acquired in fee, and also the amount thereof issued to pay for the construction of galleries, ways, subways and tunnels for subsurface structures. And provided, further, that the said contract may, in the discretion of the said board, provide that the payment of the said further sum of not less than one per centum upon the amount of said bonds as aforesaid, shall begin at a date not more than five years after the date at which the payment of rental shall begin, and that the said annual rate, instead of one per centum, may be a rate not less than one-half per centum for a further period not exceeding five years; but in case the contractor shall, during any year in which the said payment of one per centum shall be suspended or reduced as aforesaid, earn a greater profit upon his, its or their net capital invested in the enterprise than five per centum, then the surplus of his, its or their earnings for such year up to the extent of at least one per centum shall be paid as rental as aforesaid. Such

rental and the term for the operation of the railroad included in any such contract shall begin, as to said road, or any section thereof, when the same shall be declared by the board of rapid transit railroad commissioners to be completed and ready for operation. For the purpose of estimating such one per centum per annum upon the ascertainment of the amount of such rental, there shall be included such portion of the said bonds as shall have been issued to pay interest on bonds theretofore issued under the provisions of this act, except bonds issued to pay for rights, terms, easements, privileges or property other than lands acquired in fee. The aforesaid annual rental shall be paid at such times during each year as said board shall require, and shall be applied first to the payment of the interest on said bonds, as the same shall accrue and fall due, and the remainder of said rental not required for the payment of said interest shall be paid into the sinking fund, for the payment of the city debt, if there shall be such sinking fund in said city, or, if there be none such, then said balance of said rental shall be securely invested, and with the annual accretions of interest thereon, shall constitute a sinking fund for the payment and redemption at maturity of the bonds issued, as hereinafter provided. Any such contract may also provide for a renewal or renewals not to exceed twenty years in the aggregate of the lease of said road upon the expiration of the original term upon such terms and conditions, to be approved by the board of estimate and apportionment, or other analogous local authority of such city, as to said board of rapid transit railroad commissioners may seem just and proper, and may also contain provisions for the valuation of the whole or a part of the property of said contracting person, firm or corporation, employed in and about the equipment, maintenance and operation of said road, and for the purchase of the same by the city, at such valuation, or a percentage of the same, should said lease not be so renewed at any time. Such contract shall also state the date on which the operation of the road, or of any section thereof, shall commence. The city in and for which said road shall be constructed shall also have a first lien upon the rolling stock and other property of said contracting person, firm or corporation, constituting the equipment of said road and used or intended for use in the maintenance and operation of the same, as further security for the faithful performance by such contracting person, firm or corporation of the covenant conditions and agreements of said contract, on his, their, or its part to be fulfilled and performed, and in case of the breach of any such covenant, condition and agreement said lien shall be subject to foreclosure by action, at the suit of such city, in the same manner, as far as may be, as is then provided by law in the case of foreclosure by action of mortgages on real estate. The said board of rapid transit railroad commissioners may, however, from time to time, by a concurrent vote of six of the members of said board, relieve from such lien,

any of the property to which the same may attach, upon receiving additional security, which may be deemed by said board so voting to be the equivalent of that which it is proposed to release and otherwise upon such terms as to such board so voting shall seem just. The said contract shall further provide that in case of default in paying the annual sum or rental therein provided for, or in case of the failure or neglect on the part of said contracting person, firm or corporation, faithfully to observe, keep and fulfill the conditions, obligations and requirements of said contract, the said city, by its board of rapid transit railroad commissioners, may take possession of said road and the equipment thereof, and as the agent of said contracting person, firm or corporation, either maintain and operate said road, or enter into a contract with some other person, firm or corporation for the maintenance and operation thereof, retaining out of the proceeds of such operation, after the payment of the necessary expenses of operation and maintenance, the annual rental hereinbefore referred to, and paying over the balance, if any, to the person, firm or corporation with whom the first contract above mentioned was made, and if such proceeds of the operation of said road, after the payment of the necessary expenses of maintenance and operation, including the keeping in repairs of the rolling stock and other equipment, shall in any year be less than the annual rental hereinbefore referred to and provided in the first contract, then and in that case, the said contracting person, firm or corporation, and his or its bondsmen, shall be and continue (but in the case of any bond hereafter executed each bondsman only to the extent of the liability expressly assumed by him upon the bond) jointly and severally liable to the aforesaid city for the amount of such deficiency, until the end of the full term for which the said first contract was originally made. Any existing railway corporation owning or actually operating a railway wholly or in part within the limits of the city in and for which said board has power to act, and approved by the said board of rapid transit railroad commissioners, shall be competent and is hereby authorized to enter into any contract for the equipment, maintenance and operation of any railway pursuant to the provisions of this chapter, or, after such a contract shall have been made, shall be competent and is hereby authorized, with the approval of the said board, to contract with the original contractor or his assignee or assignees for the maintenance and operation (including the equipment or any part thereof) of any railway constructed or in process of construction pursuant to the provisions of this chapter, and shall have all the powers necessary to the due performance of such contract. A corporation may be organized under the railroad law of this state, for the purpose of maintaining and operating a railway (including the equipment of any part thereof) already constructed or in process of construction pursuant to the provisions of this chapter; and any corporation so organized, upon the

approval in writing of the said board of rapid transit railroad commissioners, shall, in addition to the powers conferred by the general act under which such corporation is organized, be empowered, and is hereby authorized to enter into any contract permitted by law for the maintenance and operation when constructed (including the equipment or any part thereof if desired), as the case may be, of any such railway constructed or to be constructed at the expense of the city as in this act provided. The certificate of such approval shall be filed in the office of the secretary of state, and a copy thereof certified to be a true copy by the secretary of state or his deputy, shall be evidence of the fact therein stated. A corporation so organized shall not be required to procure the consent of the board of railroad commissioners of the State as provided for in section fifty-nine of the railroad law. Where in this section or in section thirty-four of this act the consents referred to in section five of this act are mentioned, they shall be construed to include any consent given by the commissioners appointed by the general term or appellate division of the supreme court, and confirmed by the said general term or appellate division in lieu of the consent of property owners as hereinbefore provided.

(Added by L. 1906, ch. 472.)

§ 34-b. Equipment at public expense—Contracts for maintenance and operation only.—If in the opinion of the board of estimate and apportionment, or other analogous local authority of such city, a contract for the equipment, maintenance and operation as provided for in the preceding section shall be inexpedient, impracticable or prejudicial to the public interest, the board of rapid transit railroad commissioners may, with the approval of the board of estimate and apportionment, or such other analogous authority, equip the said road or roads in whole or in part, for and at the public expense, by contract or contracts therefor subject to the provisions of section 36 of this act, and enter into a contract with any person, firm or corporation, who or which, in the opinion of said board of rapid transit railroad commissioners, shall be best qualified to fulfill and carry out said contract, for the maintenance and operation of such road or roads for a term of years to be specified in said contract, and not to exceed ten years. The provisions of the foregoing sections in respect of a contract or contracts for the equipment, maintenance and operation of such road or roads shall apply to such contract for maintenance and operation so far as such provisions are pertinent and applicable thereto except that the annual rental to be paid into the city treasury for the use of said road or roads shall be based upon the total amount of bonds issued by said city for the construction and equipment, instead of for the construction alone, of said road or roads as hereinafter provided for and that the

renewal or renewal* of said contract provided for therein shall not exceed in the aggregate ten years.

(Added by L. 1906, ch. 472.)

§ 34-c. Protection to contractor—Deposit and bond—Assignment of contracts—Termination of existence of board—Forfeiture and reletting of contract.—Every contract for the construction or operation of such road or roads shall provide by proper stipulations and covenants on the part of the said city, that the said city shall secure and assure to the contractor, so long as the contractor shall perform the stipulations of the contract, the right to construct or to operate the road as prescribed in the contract, free of all right, claim or other interference, whether by injunction, suit for damages or otherwise, on the part of the owner, abutting owner, or other person. The person, firm or corporation bidding or contracting for the construction, equipment, maintenance or operation of the railroad or railroads included in any such contract shall make such deposit of cash or securities and shall give a bond to said city, in such amount as said board of rapid transit railroad commissioners shall require and with sureties to be approved by said board, who shall justify each in double the amount of his liability upon said bond. Said bond shall be a continuing security, and shall provide for the prompt payment of said contracting person, firm or corporation, of the amount of annual rental, if any, specified in the aforesaid contract, and also for the faithful performance by said contracting person, firm or corporation of all the conditions, covenants and requirements specified and provided for in said contract. In lieu of said continuing bond such contracting person, firm or corporation may, upon the approval of the said board, deposit with the comptroller or other chief financial officer of such city cash equal in amount to the entire amount of the said bond or securities which are lawful for the investment of the funds of savings banks within this state and are worth not less than the entire amount of such bond. If such bond shall have been given then after the deposit of cash and securities in lieu thereof as aforesaid, and the approval thereof by the said board, the said bond shall be surrendered by the said city to the said contracting person, firm, or corporation duly canceled by the comptroller or other chief financial officer of the said city. In the event of the deposit of cash or securities as aforesaid, the contract may provide for the payment to the contractor of the income of such securities or of interest upon such moneys at a rate not higher than the highest rate received by the city upon the deposit of its funds with banks, and may also provide for withdrawal of securities so deposited upon deposit of cash or securities of the same value, provided that all such securities shall be such as are so lawful for the investment of the funds of savings banks. The said board may in or by

* So in the original.

any such contract and in its discretion require, and this act, as the same was prior to the present amendment thereof shall be deemed to have authorized the said board to have heretofore required any other security upon any such contract. No contract entered into under authority of this act shall be assigned without the written consent of the said board of rapid transit railroad commissioners, concurred in by six members of said board. The said contracting person, firm or corporation, with such written consent and upon such terms and conditions as the said board shall prescribe, may either assign the whole of such contract or separately the right or obligation to maintain and operate the said road or roads for the remainder of the term of years specified in such contract and all rights with respect to such maintenance and operation, or included in the leasing provisions of such contract, but subject to all the terms and conditions therein stated; provided, however, that the assignee or assignees shall, in and by such assignment, assume all of the obligations of the original contractor under or with respect to such leasing provisions and all obligations which relate in any way to such operation and maintenance, and provided, further, that the said board before giving its consent shall be satisfied that the pecuniary responsibility of the assignee or assignees shall be no less than that of such original contractor; and provided, further, that all of the security or securities which the city shall have received for the performance by the original contractor of such leasing provisions and of all provisions of the contract with respect to such operation and maintenance shall continue in full force as provided in such contract, or any modification thereof, as security for the performance by such assignee of all obligations of the contractor under or with respect to such leasing provisions and such maintenance or operation. It shall be deemed to be part of every such contract that, in case the board of rapid transit railroad commissioners shall cease to exist, the legislature may provide what public officer or officers of the city shall exercise the powers and duties belonging to the board of rapid transit railroad commissioners under or by virtue of any such contract, and that in default of such provision, such powers and duties shall be deemed to be vested in the mayor of the city. Every such contract shall provide that if the contracting person, firm or corporation shall fail to construct, equip, maintain or operate the railway according to the terms of the contract, and shall, after due notice of its default, omit for more than a reasonable time to comply with the provisions of such contract, the board of rapid transit railroad commissioners may bring an action in the name and in behalf of the city to forfeit and vacate all the rights of such contracting person, firm or corporation under such contract, and for damages and otherwise as may be necessary for the sufficient and just protection of the rights of the city; or may, upon such terms as to the board of rapid transit railroad commissioners seem just, and with

such person or corporation as to the said board may seem proper, make another operating contract and lease of the said road for the residue of the term of the contractor in default; and may bring action in the name and on behalf of the city to recover from the contractor the amount due from the contractor, less the amount which shall have been received by the city, under or by virtue of such new contract, and for all other damages sustained by the city by reason of such default.

(Added by L. 1906, ch. 472.)

§ 34-d. Operation by city—Rates of fare—Use of road for certain purposes forbidden.—If in the opinion of the board of estimate and apportionment, or other analogous local authority of such city, either a contract for equipment, maintenance and operation, or a contract for maintenance and operation as provided for in the preceding sections would be inexpedient, impracticable or prejudicial to the public interest, the board of rapid transit railroad commissioners shall forthwith devise and prepare a plan for the maintenance and operation of such road or roads, and when said plan shall have been approved by the board of estimate and apportionment, or other analogous local authority of such city, the said board of rapid transit railroad commissioners shall maintain and operate such road or roads for and on behalf of said city. The rates of fare provided for in any operating contract or plan aforesaid shall be adjusted, fixed and readjusted always with a view to securing sufficient receipts therefrom, when added to the net revenues from such galleries, ways, subways or tunnels, and all other sources incidental or appurtenant to the use and operation of said road or roads, to provide for operating expenses, maintenance, interest on the cost, all other proper charges, and a sinking fund to discharge the bonds issued for the construction and equipment of such road or roads within a reasonable period, without recourse to taxation. Whenever it shall seem practicable to reduce rates of fare, the reduction shall in the first instance be in favor of school children, and then, next in order, in favor of all the public between six and nine o'clock ante meridian, and between four and seven o'clock post meridian, and then for all the public from five o'clock ante meridian until seven o'clock post meridian, and, lastly, for all the public at all times. No part of any road or roads or of its or their appurtenances, constructed under the authority of this act, shall be used for advertising purposes, except that the person, firm or corporation operating such road or roads may use the structure for posting necessary information for the public relative to the running of trains and to the operation of the road or roads. Nor shall any trade, traffic or occupation, other than required for the operation of said road or roads, be permitted thereon or in the stations thereof, except such sale of newspapers and periodicals as may, from time to time, always with the

right of revocation, be permitted by the board of rapid transit railroad commissioners.

(Added by L. 1906, ch. 472.)

§ 34-e. Power to enter into contracts for construction, equipment, maintenance and operation with same or different persons.—

Nothing contained in this act shall be deemed, or be construed as intending, to limit, or as limiting, in any manner, the discretion of the board of rapid transit railroad commissioners, provided in the opinion of the board of estimate and apportionment, or other analogous local authority of such city, it is expedient, practicable and in the public interest to do so, to enter into contracts for construction, equipment, maintenance and operation with the same person, firm or corporation, or for any one or more of said purposes with the same person, firm or corporation, or with different persons, firms or corporations, either in one contract or in separate contracts, and at any time or times.

(Added by L. 1906, ch. 472.)

§ 35. Equipment, what to include.—The equipment to be supplied by the person, firm or corporation contracting for the equipment or any part thereof, of any such road shall include all such rolling stock, motors, boilers, engines, wires, ways conduits and mechanisms, machinery, tools, implements and devices of every nature whatsoever used for the generation or transmission of motive power and including all power houses, and all apparatus and all devices for signaling and ventilation as may be required for the operation of such road and specified in the contract for such equipment.

(Added by L. 1894, ch. 752. Amended by L. 1896, ch. 729; L. 1900, ch. 616; L. 1905, ch. 599; L. 1906, ch. 472.)

§ 36. Advertising for proposals — Contents of notice — Opening and acceptance of proposals.—

The said board of rapid transit railroad commissioners before awarding any contract or contracts shall advertise for proposals for such contracts by a notice to be printed twice a week for three successive weeks in no less than four of the daily newspapers published in said city, and in such newspapers published elsewhere than in said city as said board shall determine. Such notice shall set forth and state the points within said city, between which said road or roads is or are to run, the general method of construction, the route or routes to be followed, the term of years for which it is proposed to make such contract, and such other details and specifications as said board shall deem to be proper. Said notice shall state the time and place at which said proposals will be opened, and the said board shall attend at the time and place so specified, and shall publicly open all proposals that shall have been received, but the said

board shall not be bound to accept any proposals so received, but may reject all such proposals and readvertise for proposals in the manner hereinbefore provided, or may accept any of such proposals as will, in the judgment of such board, best promote the public interest, and award a contract accordingly.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519.)

§ 37. Bonds to provide means for construction—Public hearing upon contracts.—For the purpose of providing the necessary means for such construction, or equipment, or both, as the case may be, at the public expense, of any such road or roads, including galleries, ways, subways and tunnels for sub-surface structures, and the necessary means to pay for lands, property, rights, terms, privileges and easements, whether of owners, abutting owners, or others, which shall be acquired by the city for the purposes of the construction or the operation of such road or roads as hereinafter provided and of meeting the interest on the bonds in this section hereinafter provided for accruing thereon prior to the completion and readiness for operation of the portion of such road or roads, and the galleries, ways, subways and tunnels for subsurface structures, for the construction, or equipment of which such bonds shall have been respectively issued, the board of estimate and apportionment, or other local authority in said city, in which such road or roads are to be constructed, having power to make appropriations of money to be raised by taxation therein, from time to time, and as the same shall be necessary, and upon the requisition of said board of rapid transit railroad commissioners, shall direct the comptroller, or other chief financial officer of said city, and it shall thereupon become his duty, to issue the bonds of said city at such a rate of interest, as the board of commissioners of the sinking fund of said city, if there be such a board, or if there be no such board then as other local authority directing the issue of such bonds, may prescribe. Said bonds shall provide for the payment of the principal and interest in gold coin of the United States of America. They shall not be sold for less than the par value thereof, and the proceeds of the same shall be paid out and expended for the purposes for which the same are issued, upon vouchers certified by said board of rapid transit railroad commissioners. Said bonds shall be free from all taxation for city and county purposes, and shall be payable at maturity out of the sinking fund for the payment of the city debt, if there be such a sinking fund of said city; but if there be no such sinking fund, then out of a sinking fund to be established and created out of the annual rentals of said road as hereinbefore provided. But this provision that the said bonds shall be payable out of such sinking fund shall not diminish or affect the obligation of said city as a debtor upon said bonds, or any other right or remedy of any holder or owner of any such bonds, to collect the principal or

interest thereof. The amount of bonds authorized to be issued and sold by this section shall not exceed the limit of amount which shall be prescribed by the board of estimate and apportionment or such other local authority having power to make appropriations of moneys to be raised by taxation; and no contract for the construction of such road or roads shall be made unless and until such board of estimate and apportionment or such other local authority shall have consented thereto and prescribed a limit to the amount of bonds available for the purposes of this section which shall be sufficient to meet the requirements of such contract in addition to all obligations theretofore incurred and to be satisfied from such bonds. Before finally fixing the terms and conditions of any contract for any of the purposes contained and set forth in this act, the board of rapid transit railroad commissioners of the appropriate city shall set a date or dates for a public hearing upon the proposed terms and conditions thereof, at which citizens shall be entitled to appear and be heard. No such hearing shall be held, however, until notice thereof shall have been published for at least two weeks immediately prior thereto in the city record, or other official publication of the city, and at least twice in two daily newspapers published in the city, to be designated by the mayor. It shall be the duty of the board of rapid transit railroad commissioners to cause not less than five hundred copies of a draft of the proposed contract to be printed at least two weeks in advance of such hearing. The said notice of such public hearing shall state where copies of such drafts may be obtained upon payment of a fee, to be fixed by said board, but not to exceed one dollar for each such copy. The said board may, after the hearing to be held as above required, alter, modify or amend such draft contract in any manner in its discretion.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519; L. 1904, ch. 562; L. 1906, ch. 607; L. 1907, ch. 534.)

§ 38. Modification of contracts or plans.—The board of rapid transit railroad commissioners for and on behalf of the said city in which such road or roads may be constructed, may, from time to time, with the concurrence of six members of said board and the consent, in writing, of the bondsmen or sureties of the person, firm or corporation which has contracted to construct, equip, maintain or operate said road or roads, or any of them, agree with the said contracting person, firm or corporation upon changes in and modifications of said contract, or of the plans and specifications upon which said road or roads is or are to be constructed, but no change or modifications in the plans and specifications consented to and authorized pursuant to section five of this act shall be made without the further consent and authorization provided for in said section; but in no event shall the annual rental

to be paid to said city, for the use of said road, be reduced below the minimum rate hereinbefore provided.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519; L. 1906, ch. 472.)

§ 38-a. Elevated railroads in lieu of bridge approaches — Plan — Consents — Rates — Powers of company — Route — Crossings — Taxation.—The board of directors of any company incorporated for the purpose of constructing, maintaining or operating a bridge or bridges connecting a city of more than one million inhabitants with any other city in this state, and by the act of incorporation of which authority shall have been conferred or intended to be conferred, to construct, maintain or operate, as a part of or in connection with its bridge, an approach or approaches thereto extending generally in an easterly and westerly direction, may determine in lieu of constructing such approach or approaches, to build, maintain and operate an elevated railway, the route of which shall be coincident with the route of such approach or approaches as defined in said act, and shall adopt a general plan for the construction thereof, and which shall show the general mode of operation, and contain such details as to manner of construction as may be necessary to show the extent to which any street, avenue, or other public place is to be encroached upon and the property abutting thereon affected, a copy of which plan shall be transmitted to the common council of the city in which the same is to be located. Such proceedings shall thereupon be had by such common council as are provided by section five of this act, as though such plans had been transmitted by the rapid transit commissioners as contemplated in said section. Provided, that where in any such city the exclusive control of any street, route, highway or avenue, which is to be occupied by any railway or railways constructed under the provisions of this section is by law vested in any local authority other than the common council of such city, the approval of the aforesaid plans, and consent to the construction of a railway thereunder shall be given by such local authority in place of, and if required in addition to such approval and consent by such common council, and with like effect. Upon obtaining the approval and consent of the local authorities as in said section provided, the said board of directors shall take the necessary steps to obtain, if possible, the consent of the property owners along the line of the said route or routes, and all proceedings in respect of such consents or when such consents cannot be obtained shall be similar in all respects to the proceedings in said section provided. Any consent of the local authorities to construct or operate such railway shall be given only upon the condition that the rate of fare upon such elevated railway shall not exceed five cents for each passenger, and that payment of such fare shall entitle each passenger to or from said elevated railroad to free transit across the bridge

or bridges with which it is intended to connect the same. When the consents of the local authorities and the property owners, or in lieu thereof, the authorization of the supreme court upon the report of the commissioners shall have been obtained, and the said company shall have accepted such condition it shall have all the powers of corporations formed under this act, it shall be authorized to build, construct, maintain and operate such elevated railway or railways, but all provisions of this act, or of any act requiring the sale of the right, privilege and franchise of constructing, maintaining and operating such railway or railways, or requiring a corporation or corporations to be organized for the purpose of acquiring such right, privilege and franchise, and all other provisions of this act, or of any act inconsistent with this section, are hereby declared inapplicable to such elevated railway and to such company. The entire route of any elevated railway constructed under the provisions of this section shall not exceed three miles in length, nor shall any part of said railway except at the termini thereof be less than sixteen feet above any street, avenue or public place, or less than fourteen feet above any existing elevated railway which may be crossed, intervened or intersected thereby. The said railway may be located and constructed so as to cross any intersecting street, avenue, highway or place otherwise exempted, except that no public park shall be occupied or crossed thereby, the structure of such elevated railway shall be liable to taxation as provided by law for similar structures.

(Added by L. 1892, ch. 102. Amended by L. 1895, ch. 519.)

§ 39. Acquisition of real estate, etc., for construction and operation of railway — Sale — Contracts for lateral support.— For the purpose of constructing or operating any road for the construction or operation of which a contract shall have been made by the board of rapid transit railroad commissioners, including necessary stations and station approaches, or for the purpose of operating or securing the operation of the same free of interference and right of interference and of action and right of action for damages and otherwise, whether by abutting owners or others, or to provide, lay or maintain conduits, pipes, ways or other means for the transmission of electricity, steam, water, air or other source or means of power or of signals or of messages necessary or convenient for or in the construction or operation of such road, or for the transportation of materials necessary for such construction or operation, or to provide a temporary or permanent way or course for any such conduit, pipe or other means or source of transportation, said board for and in behalf of said city may acquire, by conveyance or grant to said city to be delivered to the said board and to contain such terms, conditions, provisos and limitations as the said board shall deem proper, or by condemnation or other legal or other proceedings, as in this act provided, any real estate and any rights,

terms and interest therein, any and all rights, privileges, franchises and easements, whether of owners or abutters, or others to interfere with the construction or operation of such road or to recover damages therefor, which, in the opinion of the board, it shall be necessary to acquire or extinguish for the purpose of constructing and operating such road free of interference or right of interference. The word property hereinafter used shall be deemed to include any such real estate, and any rights, terms and interest therein, and any such rights, privileges, franchises and easements, whether of owners, abutting owners, or others. Where any contractor for the construction or operation of any such railroad shall require any property for such construction and operation, such property shall be deemed to be required for a public purpose; and with the approval of the said board of rapid transit railroad commissioners the same may be acquired by the said contractor in all respects as such property may be acquired by the said board of rapid transit railroad commissioners for the said city, and all proceedings to acquire the said property shall be conducted under the direction and subject to the approval of the rapid transit railroad commissioners. It shall be the duty of the board whenever any property which the city shall have acquired as provided in this act shall be unnecessary for rapid transit purposes, to sell and convey the same in behalf of said city, provided, however, that no such sale or conveyance shall be made except with the approval of the commissioners of the sinking fund of such city, or, if there be no commissioners of the sinking fund then the other board or public body thereof having power to sell or lease city property and provided further that the proceeds of any such sale or conveyance shall, under the direction of the said board of rapid transit railroad commissioners, be applied either to the purchase of other property necessary for rapid transit purposes or shall be applied in all respects as the payments of rental to be made by the contractor as provided in this act. Whenever the said rapid transit railroad commissioners for and in behalf of the city shall have acquired or shall hereafter acquire an easement in property by conveyance or grant for the purpose of the operation or construction of a rapid transit railroad, it may in behalf of the city and as part consideration for the grant or conveyance of the easement, enter into an agreement with the grantor of such easement or right of way, giving to such grantor or his assigns, the right of lateral or other support through, in, or under the said property, or any adjoining lands or space occupied by said rapid transit railroad for any building erected or to be erected upon the land over which the easement or right of way has been obtained for the support and maintenance of any such building or buildings, provided that any structure that shall be built for the support of any such building or buildings shall be approved by

said board and shall not extend in or under any street beyond the curb lines as fixed by the ordinances of the board of aldermen or other legislative body of such city.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519; L. 1896, ch. 729; L. 1901, ch. 587; L. 1904, ch. 564; L. 1906, ch. 472.)

§ 40. Entry upon lands and property — Maps and plans to be made — Certification and filing — Making and filing of amended maps. — It shall and may be lawful for said board, and for all persons acting under its authority, to enter in the day time into and upon any and all lands and property which it shall deem necessary to be acquired, or to which there may be appurtenant rights, terms, franchises, easements or privileges which it shall deem necessary to be acquired or extinguished by said city, for the purpose of making the maps or surveys hereinafter mentioned, and also to enter in like manner and for the same purpose upon any property adjacent to and within five hundred feet of the property to be so surveyed; and the said board shall cause three similar maps or plans to be made of each parcel of property which it may deem necessary so to be acquired or to which there may be appurtenant rights, terms, franchises, easements or privileges necessary so to be acquired or extinguished, designating each of said parcels by a number, and upon each map or plan so made or in a memorandum accompanying the same and to be deemed part thereof of the said board shall cause to be clearly indicated the particular estate or estates, rights, terms, privileges, franchises or easements to be acquired or extinguished for the purposes of this act, in relation to each and every piece or parcel of property described upon said map or plan. The said board shall have power to cause a triplicate set of maps or plans and memoranda as herein provided for to be made as often and at such times as said board shall determine, and each set of maps or plans and memoranda so made shall contain the particulars above enumerated within such district as said board shall in each case provide. The maps or plans and memoranda herein provided for, when approved and adopted by said board, shall have written thereon a certificate of such approval, signed by the members of said board adopting and approving the same, and one copy thereof shall be filed in the department of public works, or other chief executive department having principal charge of the streets, there to remain as a public record, and the other two of said maps or plans and memoranda shall be transmitted to the counsel to the corporation or other principal legal adviser of said city. The said board may from time to time make and file further maps or plans and memoranda amending those already filed, but not so as to defeat or impair any property or interest which shall have been already acquired, or to revive any interest or right which may have been already extinguished by the said city.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519.)

§ 41. Board may direct proceedings to acquire property.—Whenever and as often as the said board shall deem it to be necessary and proper that the said city should acquire any such property and shall have caused to be made, as provided in the last preceding sections, the maps or plans and memoranda specifying and defining the said property to be acquired, or to which are appurtenant the rights, terms, franchises, easements or privileges to be acquired or extinguished, and shall have certified, filed and transmitted the several copies of such maps or plans as in the last section prescribed, the said board may direct the counsel to the corporation or other principal legal adviser of said city, to take legal proceedings to acquire the same for the said city, and the said counsel to the corporation, or other principal legal adviser, shall thereupon take proceedings as in this act provided.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519.)

§ 42. Filing of maps with register or county clerk.—The said counsel to the corporation, or other principal legal adviser of said city, shall cause one of the maps or plans, so as aforesaid transmitted to him, to be filed in the office of the register of the county, or if there be no such register, then in the office of the county clerk of the county in which said city is situated. The map, hereinafter denominated the third map, being the other one of the two so as aforesaid transmitted to said counsel to the corporation, or other legal adviser, shall be disposed of as hereinafter provided.

(Added by L. 1894, ch. 752.)

§ 43. Application for appointment of commissioners of appraisal.—After the said set* shall have been filed as hereinbefore provided in the office of the register or county clerk of said county, the said counsel to the corporation, or other principal legal adviser, for and on behalf of the said city, shall, and he may from time to time, upon first giving the notice required by the next section of this act, apply to the supreme court at any special or general term thereof, to be held in the judicial district in which said city is situated, for the appointment of commissioners of appraisal. Upon each such application he shall present to the court a petition, signed by a majority of the members of said board and verified in the manner prescribed by law for the verification of pleadings, according to the practice of said court, setting forth the action or determination theretofore taken or had by said board, with respect to the property to be acquired, and the filing of said maps or plans and memoranda and praying for the appointment of such commissioners of appraisal. Such petition shall contain a general description of all the property to, or in or over or appurtenant to which any title, interest, right, franchise, easement, term or privi-

* So in the original.

lege is sought to be acquired or extinguished, and of every right, franchise, easement, or privilege sought to be acquired, by the said city for public purposes, each lot or parcel being more particularly described by a reference to the number of said lot or parcel as given on said maps, and the title, interest, right, easement, term or privilege sought to be acquired, or extinguished, to or in or over or appurtenant to each of said lots or parcels shall be stated in said petition.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519.)

§ 44. Publication of notice, or service of petition and notice of application for appointment of commissioners.—The said counsel to the corporation, or other principal legal adviser, shall give or cause to be given notice by publication in two public newspapers published in the said city, or, instead of such publication, may in his discretion cause service of the petition and notice of his intention to make application to the said court for the appointment of such commissioners of appraisal, to be made in the same manner prescribed by section three thousand three hundred and sixty-two of the code of civil procedure, as amended by chapter ninety-five of the laws of eighteen hundred and ninety, such notice if published as aforesaid shall state the time and place of such application, shall briefly state the object of the application, and shall briefly describe the property sought to be acquired or affected, and refer to a fuller statement to be filed in the office of the board of rapid transit railroad commissioners, in which shall be set forth the location and boundaries of the several lots or parcels of property, and rights, franchises, easements or privileges sought to be taken or affected, and a brief statement as to each of said lots or parcels, of the title, interest, rights, easements, terms or privileges therein or appurtenant thereto sought to be acquired or extinguished, with a reference to the dates and places of filing the said maps or plans and memoranda shall be a sufficient description of the property sought to be so taken or affected. Such notice in case of publication as aforesaid shall be so published, in said newspapers twice a week for six weeks immediately previous to the time fixed in said notice for the presentation of each petition.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519; L. 1902, ch. 533.)

§ 45. Order for appointment of commissioners.—At the time and place mentioned in said notice, unless the said courts shall adjourn said application to a subsequent date, and in that event at the time to which the same may be adjourned, the court, upon due proof to its satisfaction of the publication aforesaid, and upon filing the said petition, shall make an order for the appointment of three disinterested freeholders, residents in said city, as commissioners of appraisal, to

ascertain and appraise the compensation to be made to the owners of property so to be taken or extinguished for the purposes indicated in this act. Such order shall fix the time and place for the first meeting of the commissioners.

(Added by L. 1894, ch. 752.)

§ 46. Oath of commissioners.—The said commissioners shall take and subscribe the oath required by the twelfth article of the constitution of the state of New York, and shall forthwith file the same in the office of the clerk of the county in which said city is situated.

(Added by L. 1894, ch. 752.)

§ 47. City seized in fee of lands upon filing oath — Possession — Entry and occupation — Actions by owners.—On filing said oath in the manner provided in the last section, the said city shall be and become seized and possessed in fee or absolute ownership of all those parcels of property, rights, terms, franchises, easements and privileges which are in the maps or plans and memoranda referred to in section forty of this act, described as parcels of property, rights, franchises, easements, or privileges which are to be acquired, and also shall become seized and possessed of all the rights, terms, franchises, easements or privileges appurtenant to any lots or parcels of property indicated on said maps or plans as parcels in regard to which it is deemed necessary to acquire such rights, terms, franchises, easements or privileges, or the said rights, terms, franchises, easements or privileges shall be extinguished as the case may be; and the said board for the said city, may immediately or at any time or times thereafter take possession or enter into the enjoyment of the said property, rights, terms, franchises, easements and privileges or of any part or parts thereof without any suit or proceeding at law for that purpose and the said board for the said city, or any person or persons acting under their or its authority, may enter upon and use, occupy, and enjoy in perpetuity all the parcels of property and all the rights, terms, franchises, easements or privileges appurtenant to any of the parcels of property and all rights, franchises, easements, and privileges, described on said maps or plans in said memoranda, for any of the purposes authorized and provided for by this act. But on such filing of the said oath the said city shall be and become forthwith liable to the respective owners of the several parcels of property and the several rights, terms, franchises, easements and privileges appertaining thereto, and of the said rights, franchises, easements, and privileges acquired as aforesaid, for the true and respective values thereof, together with interest thereon from the time of filing the said oath, provided, however, that no such interest shall be payable to any owner of any such property, right, term, franchise, easement or privilege during any period during which the said city or

the said board of rapid transit railroad commissioners may by any resistance, whether by legal proceedings or otherwise of such owner or with his authority, be prevented from taking possession thereof or enjoying the same; and provided further, that no action shall be brought to recover the amount of such value or interest unless within eighteen months after the filing of such oath, a report shall not have been duly made by the commissioners of appraisal as herein provided, or such report shall not have been confirmed by the supreme court as herein provided, so that the said city shall be liable to forthwith pay the amount by such report ascertained to be due for such value or interest.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519.)

§ 48. Powers and duties of commissioners of appraisal—Vacancies.—Any one of said commissioners of appraisal may issue subpoenas and administer oaths to witnesses, and they or any one of them, in the absence of the others, may adjourn the proceedings, from time to time in their discretion, but they shall continue to meet from time to time as may be necessary to hear, consider and determine upon all claims which may be presented to them under any of the provisions of this act. In case of the death, resignation, refusal or neglect to serve of any commissioner of appraisal, the remaining commissioner or commissioners shall, upon ten days' notice, to be given by advertisement in the newspapers mentioned in section forty-four of this act, apply to the supreme court, at a special or general term thereof, to be held in the judicial district in which said city is situated, for the appointment of a commissioner or commissioners to fill the vacancy or vacancies so occasioned. In case of the death, resignation or refusal to serve of all the commissioners of appraisal, the said counsel to the corporation or other principal legal adviser to said city shall, on giving the notice required in this section, apply to the said court for the appointment of other commissioners of appraisal. It shall be the duty of the commissioners of appraisal to procure from the counsel to the corporation or other principal legal adviser the third set of maps or plans and memoranda provided for in sections forty and forty-two of this act. They shall view the property laid down on said map, and shall hear the proofs and allegations of any owner, lessee or other person in any way entitled to or interested in the property to be acquired or extinguished, or any part or parcel thereof, and also such proofs and allegations as may be offered on behalf of the said city. They shall reduce the testimony, if any, taken before them to writing, and after the testimony is closed, they, or a majority of them, all having considered the same, and having an opportunity to be present, shall, without unnecessary delay, ascertain and determine the compensation which ought justly to be made by the said city to the owners or persons interested in the property acquired or extinguished by said proceedings. The

said commissioners of appraisal shall make reports of their proceedings to the supreme court, as in the next section provided with the minutes of the testimony taken before them, if any, and they shall be entitled to the payment hereinafter provided for their services and expenses, to be paid from the fund hereinafter specified. The said commissioners may make a single report or may make reports from time to time as they shall reach their several decisions as to different parcels of property.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519.)

§ 49. Report of commissioners.—The said commissioners shall prepare a report or reports, to which shall be annexed the third set of maps or plans and memoranda referred to in section forty-two of this act and therein denominated the third set or a copy thereof certified by them. Each said report shall contain a brief description of the property so taken or affected, with a reference to the map upon which the same is required to be indicated; a statement of the sums estimated and determined upon by them, as a just compensation for the same to be made by the city to the owners or persons interested therein and the names of such owners and persons; but in all and each and every case or cases where one or more of the owners and persons interested, or their respective estates or interests, are unknown, or not fully known, to the commissioners of appraisal, it shall be sufficient for them to set forth and state in general terms the respective sums to be allowed and paid to the owners of and persons interested therein, generally, without specifying the names or estates or interests of such owners or persons interested, or any or either of them.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519.)

§ 50. Filing of reports.—Each said report, signed by said commissioners, or a majority of them, shall be filed in the office of the clerk of the county in which said city is situated, and the commissioners of appraisal shall, in each case, notify the counsel to the corporation, or other principal adviser to said city, as soon as any such report is filed.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519.)

§ 51. Notice of presentation of report to court.—The counsel to the corporation, or other principal legal adviser, or, in case of his neglect to do so within ten days after receiving notice of such filing, then any person interested in the proceedings, shall give notice that the said report will be presented for confirmation to the supreme court, at a special term thereof, to be held in the judicial district in which said city is situated, at a time and place to be specified in said notice. The said notice shall contain a statement of the time and place of the

filing of the report, and shall be published in two daily newspapers published in such city, for at least two weeks immediately prior to the presentation of said report for confirmation.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519.)

§ 52. Confirmation of report.—The application for the confirmation of each such report shall be made to the supreme court at a special term thereof, held in the judicial district in which said city is situated. Upon the hearing of the application for the confirmation thereof, the said court shall confirm such report and make an order containing a recital of the substance of the proceedings in the matter of the appraisal, with a general description of the property appraised and for which compensation is to be made, and shall also direct to whom the money is to be paid, and whether or not any part thereof, and, if so, what part, is to be deposited with the comptroller or other chief financial officer of said city with the chamberlain of said city, or if there be no chamberlain, with a bank or trust company to be designated by said court. Such report when so confirmed shall, except in the case of an appeal, as hereinafter provided, be final and conclusive, as well upon the said city as upon owners and all persons interested in or entitled to said property, and also upon all other persons whomsoever.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519.)

§ 53. Payment of awards—Actions for recovery of same.—The said city shall, within four calendar months after the confirmation of any report of the commissioners of appraisal, pay to the respective owners and bodies politic or corporate mentioned or referred to in said report, in whose favor any sum or sums of money shall be estimated and reported by said commissioners, the respective sum or sums so estimated and reported in their favor respectively, with legal interest thereon from the date of filing the oath of said commissioners, and in case of neglect or default in the payment of the same within the time aforesaid, the respective person or persons or bodies politic or corporate, in whose favor the same shall be so reported, his, her or their executors, administrators, successors or assigns at any time or times after application first made by him, her or them, to the comptroller or other chief financial officer of said city for payment thereof, may sue for and recover the same, with lawful interest as aforesaid, and the costs of suit, in any proper form of action against the said city in any court having cognizance thereof, and in which it shall be sufficient to declare generally for so much money due to the plaintiff or plaintiffs therein by virtue of this act for property taken or extinguished for the purposes herein mentioned, and the report of said commissioners, with proof of the right and title of the plaintiff or plaintiffs to the sum or sums demanded shall be conclusive evidence in such suit or action.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519.)

§ 54. Payment of award to chamberlain or bank in certain cases — Recovery of award paid to wrong party.— Whenever the owner or owners, person or persons interested in any property taken or affected in such proceeding, or in whose favor any such sum or sums or compensation shall be so reported, shall be under the age of twenty-one years, or of unsound mind or absent from the city, and also in all cases where the name or names of the owner or owners, person or persons, interested in any such property shall not be set forth or mentioned in said report, or where the said owner or owners, person or persons, being named therein, can not, upon diligent inquiry, be found, or where there are adverse or conflicting claims to the money awarded as compensation, it shall be lawful for the said city to pay the sum or sums mentioned in said report, payable, or that would be coming to such owner or owners, person or persons, respectively, with interest, as aforesaid, to the chamberlain of said city, or, if there be no chamberlain, then to any bank or trust company designated by the court in the order confirming the report of the commissioners of appraisal, to the credit of such owner or owners, person or persons, and such payment shall be as valid and effectual in all respects as if made to the said owner or owners, person or persons, interested therein, respectively, according to their just rights; and, provided, also, that in all and each and every such case and cases where any sum or sums or compensation reported by the commissioners in favor of any person or persons or parties whatsoever, whether named or not named in said report, shall be paid to any person or persons, or party or parties, whomsoever, when the same shall of right belong and ought to have been paid to some other person or persons, or party or parties, it shall be lawful for the person or persons, or party or parties, to whom the same ought to have been paid, to sue for and recover the same, with lawful interest and costs of suit, as so much money had and received to his, her or their use by the person or persons, party or parties, respectively, to whom the same shall have been so paid.

(Added by L. 1894, ch. 752.)

§ 55. Claims for compensation — Refusal or neglect to present claims.— Every owner or person in any way interested in any property taken or extinguished as contemplated in this act, if he intends to make claim for compensation for such taking or extinguishment, shall within six months after the appointment of the commissioners of appraisal exhibit to the said commissioners a statement of his claim, and shall thereupon be entitled to offer testimony and to be heard before them touching such claim and the compensation proper to be made him, and to have a determination made by such commissioners of appraisal as to the amount of such compensation. Every person neglecting or refusing to present such claim within said time shall be deemed to have

surrendered his claim for such compensation, except so far as he may be entitled, as such owner or person interested, to the whole or a part of the sum of money awarded by the commissioners of appraisal as a just compensation for taking or extinguishing the property owned by said person, or in which the said person is interested.

(Added by L. 1894, ch. 752. Amended by L. 1901, ch. 587.)

§ 56. Payment of awards to persons named protects the city.—

Payment of the compensation awarded by said commissioners of appraisal to the persons named in their report (if not infants or persons of unsound mind), shall, in the absence of notice to the said city or other claimants to such award, protect the said city.

(Added by L. 1894, ch. 752.)

§ 57. Specified claims and special reports thereon.—Said commissioners of appraisal may in their discretion take up any specified claim or claims, and finally ascertain and determine the compensation to be made thereon, and make a separate report with reference thereto, annexing to said report a copy of so much of the set of maps or plans and memoranda referred to in section forty-two of this act as indicates the property so reported on. Such report shall, as to claims therein specified, be the report required in this act, and the subsequent action with reference thereto, shall be had in the same manner as though no other claim were embraced in said proceeding, which, however, shall continue as to all claims upon which no such determination and report is made.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519.)

§ 58. Appeal from appraisal and report.—Within twenty days after notice of the confirmation of the report of the commissioners, as provided for in section fifty-two of this act, which notice may, as to parties who have not appeared before the commissioners, be given in the manner provided in section fifty-one of this act, either party may appeal to the general term of the supreme court in the department in which such commissioners were appointed, from the appraisal and report of the commissioners and the order confirming the same. Such appeal shall be heard upon due notice thereof being given, according to the rules and practice of said court. On the hearing of such appeal the court may direct a new appraisal and determination of any question passed upon, by the same or new commissioners, in its discretion, and from any determination of the general term either party, if aggrieved, may take an appeal, which shall be heard and determined by the court of appeals. In the case of a new appraisal the second report shall be final and conclusive on all the parties and persons interested. If the amount of compensation to be made by such city is increased by

the second report, the difference shall be paid by the comptroller or other chief financial officer of said city, to the parties entitled to the same, or shall be deposited with the chamberlain, or bank or trust company, as the court may direct, and if the amount is diminished the difference shall be refunded to the said city by the party to whom the same may have been paid, and judgment therefor may be rendered by the court on the filing of the second report against the party liable to pay the same. But the taking of an appeal by any person or persons shall not operate to stay the proceedings under this act except as to the particular property with which the said appeal is concerned. Such appeal may be heard upon the evidence taken before said commissioners, and any affidavits as to irregularities, and three printed copies of such evidence shall be furnished by the said city to the party taking the appeal, within ten days after the appeal is perfected, and such appeal may be heard upon the evidence so furnished, and may be taken without security thereon.

(Added by L. 1894, ch. 752.)

§ 59. Power of court to amend defects—Appointment and removal of commissioners.—The supreme court in the judicial district in which said city is situated shall have power at any time to amend any defect or informality in any of the special proceedings authorized by this act as may be necessary, and to direct such further notices to be given to any party in interest as it deems proper, and also to appoint other commissioners in place of any who shall die, or refuse, or neglect to serve or be incapable of serving, or be removed. And the said court may at any time remove any commissioner of appraisal who in its judgment shall be incapable of serving, or who shall for any reason in its judgment be an unfit person to serve as such commissioner. The cause of such removal shall be specified in the order making the same. If in any particular it shall at any time be found necessary to amend any pleading or proceeding or to supply any defect therein arising in the course of any special proceeding authorized by this act, the same may be amended or supplied in such manner as shall be directed by the supreme court, which is hereby authorized to make such amendment or correction. Wherever in this act reference is made to the general term of the supreme court, it shall be deemed to include the appellate division of the supreme court for the district in which said city is situated, whenever said general term shall be superseded thereby.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519.)

§ 60. Property acquired deemed to be acquired for public use.—All property acquired under the provisions of this act shall be and shall be deemed to have been acquired for public uses and purposes,

and for the purpose of affording increased facilities for rapid transit between points within the city acquiring such property.

(Added by L. 1894, ch. 752.)

§ 61. Expense payable from proceeds of bonds—Certain expenses part of construction.—The moneys necessary and sufficient to be paid for any property, acquired in any manner under the provisions of this act, together with all expenses necessarily incurred in surveying, locating, and acquiring title to such property, and for surveying and locating the same, and for preparing the necessary maps and plans in connection therewith, shall be raised and paid out of the proceeds of bonds issued and sold as provided by section thirty-seven of this act, and all such expenses so incurred in surveying, locating and acquiring title, and for preparing necessary maps and plans and also those incurred as provided in the next section shall be deemed a part of and included in the cost of constructing the road or roads, the construction of which rendered it necessary to acquire the property in the course of the acquisition of which such expenses may be incurred.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519.)

§ 62. Compensation of commissioners of appraisal—Employees and compensation thereof—Fees and expenses of proceedings.—The commissioners of appraisal appointed in pursuance of this act shall receive as compensation the sum of ten dollars per day for each day actually employed. They may employ the necessary clerks, stenographers and surveyors. The counsel to the corporation or other principal legal adviser to said city shall, either in person or by such counsel as he shall designate for the purpose, appear for and protect the interests of the city in all such proceedings in court and before the commissioners. The fees of the commissioners and the salaries and compensation of their employes, and all other necessary expenses in and about the said proceedings provided for by this act, and such allowance for counsel fees as may be made by order of the court, and all reasonable expenses incurred by said counsel to the corporation, or other principal legal adviser of said counsel designated by him for the proper presentation and defense of the interests of said city before said commissioners and in court, shall be paid by the comptroller or other chief financial officer of said city out of the funds referred to in the last preceding section. But such fees and expenses shall not be paid until they have been taxed before a justice of the supreme court in the judicial district in which said city is situated upon five days' notice to the counsel to the corporation, or other chief legal adviser of said city. Such allowance shall, in no case, exceed the limits prescribed by section thirty-two hundred and fifty-three of the code of civil procedure.

(Added by L. 1894, ch. 752.)

§ 63. Proviso as to roads constructed at city's expense.—In case it shall be determined by vote of the people as provided by sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, to construct by and at the city's expense, then and in that event the road or roads so constructed shall be and remain the absolute property of the city so constructing it or them, and shall be and be deemed to be a part of the public streets and highways of said city, to be used and enjoyed by the public upon the payment of such fares and tolls, and subject to such reasonable rules and regulations as may be imposed and provided for by the board of rapid transit railroad commissioners in said city.

(Added by L. 1894, ch. 752. Amended by L. 1895, ch. 519.)

§ 64. Construction of act—Rights not affected—Laws not repealed—Proviso as to constructing of railways.—This act shall not be construed to repeal or in any manner affect chapter six hundred and six of the laws of eighteen hundred and seventy-five, entitled "An act to further provide for the construction and operation of a steam railway or railways in the counties of this state," or the acts amendatory thereof or supplemental thereto, or article five of chapter five hundred and sixty-five of the laws of eighteen hundred and ninety, known as the railroad law, except so far as the said acts, or either of them, would, if this act had not been passed, authorize the appointment hereafter of any commissioners applied for as provided in section one of said act of eighteen hundred and seventy-five, or in section one hundred and twenty of said act of eighteen hundred and ninety, in any city or cities containing a population of over one million inhabitants, according to the last preceding national or state census, or authorize any commissioners already appointed pursuant to the provisions of such act or acts in any such city or cities, to fix, determine or locate any new route or routes, pursuant to the provisions of either of said acts. This act shall not be construed in any manner to affect the exercise or enjoyment at any time, and from time to time hereafter, of any right or rights heretofore acquired, exercised or enjoyed by any corporation heretofore duly incorporated and organized or deriving powers and rights under the laws of this state. This act shall not affect or impair the exercise or enjoyment of any right or rights now possessed or heretofore acquired or heretofore authorized to be acquired, exercised or enjoyed by any street surface railroad corporation, except as herein otherwise expressly provided, and this act shall not be construed to repeal or in any manner affect chapter one hundred and forty of the laws of eighteen hundred and fifty, entitled "An act to authorize the formation of railroad corporations, and to regulate the same," or either of the several acts amendatory thereof or supplementary thereto. This act shall not be construed to repeal or in any manner affect chapter five hundred and

sixty-five of the laws of eighteen hundred and ninety, known as the railroad law, except as hereinabove expressly provided, or except so far as the provisions of the same conflict with the provisions of this act. But nothing in this section contained shall prevent the board of rapid transit railroad commissioners from laying out a route for a railway and constructing and operating a railway, and such board shall have the right to lay out such route and construct and operate such railway, over, under, along or across any street in, along, under or over which there shall be any existing railway, provided that the routes so laid out by the said board and the railway so constructed by it shall so pass over or under or at the side of such existing railway as not to interfere with its operation.

(Originally § 34. Section number changed to 64 by L. 1894, ch. 752. Amended by L. 1895, ch. 519; L. 1906, ch. 472.)

§ 65. Repeal.—All acts and parts of acts, local or general, inconsistent with this act are hereby repealed.

(Originally § 36. Section number changed to 66 by L. 1894, ch. 752, and to 65 by L. 1906, ch. 472.)

§ 66. Time of taking effect.—This act shall take effect immediately.

(Originally § 37. Section number changed to 67 by L. 1894, ch. 752, and to 66 by L. 1906, ch. 472.)

LAWS OF 1894, CHAPTER 752.

§ 10. Number required to concur in vote.—Whenever it is expressly provided in the act hereby amended that any act of the board of rapid transit railroad commissioners shall be done by the concurrent vote of four of the members of said board, the act hereby amended is further amended so as to provide in such cases that such vote shall be that of six of such members.

§ 11. Transfer of books, property, etc.—Payment of expenses and compensation of outgoing commissioners.—The commissioners of rapid transit heretofore appointed under the act hereby amended, or who became such commissioners by its terms, upon the organization of the board which shall succeed them pursuant to said act as hereby amended, shall cease to be such commissioners and shall transfer and deliver to the board of rapid transit railroad commissioners, provided for by the act hereby amended, as so amended, all furniture, books, maps, records, plans and other papers and property of what kind soever appertaining or belonging to or in the custody of the board of which

they were commissioners, or in their possession, or under their control as such commissioners, or held by them, or for which they are responsible in their official capacity. The expenses incurred by said commissioners for which an appropriation or appropriations shall have been made pursuant to section ten of the act hereby amended, shall be paid upon vouchers to be furnished by said commissioners and otherwise, as provided in said section. Said commissioners shall also be entitled to receive a reasonable compensation for the services which have been rendered by them, which may have been, or which shall be, determined on their application in the manner provided for in said section. The comptroller, or other chief financial officer of said city, is hereby authorized and directed to issue and sell revenue bonds of such city in anticipation of the receipt of taxes, and out of the proceeds of such bonds to pay said compensation so ascertained and determined, and the amount necessary to pay the principal and interest of said bonds shall be included in the tax levy of said city for the year next following the issue and sale of the same.

§ 12. Submission to electors of question whether a rapid transit railway shall be constructed.—The said board of rapid transit railway commissioners shall cause the question, whether such railway or railways shall be constructed by the city and at the public expense, to be submitted to the vote of the qualified electors of the city within which such railway or railways is or are to be constructed, and to that end it shall be the duty of the said board, after completion of the detailed plans and specifications, as required by the act hereby amended, at least thirty days prior to the next general election, to file with the public officer or officers within the county in which such city is located, who may be charged with the duty of printing the ballots to be used at such election, a request that separate ballots be printed and supplied to such electors, one-half in number of which shall read: "For municipal construction of rapid transit road," and the other half in number of said ballots shall read, "Against municipal construction of rapid transit road." Upon such request being so filed, such ballots shall be printed and supplied to such electors at such general election, and separate ballot boxes shall be provided for the reception of the same in each election district within such city, and the provisions of chapter six hundred and eighty of the laws of eighteen hundred and ninety-two, entitled "An act in relation to the elections constituting chapter six of the general laws," and any act or acts amendatory thereof or supplemental thereto shall apply thereto as far as the nature of the case may allow. No ballot which may be provided under this section shall be deemed invalid by reason of any error in dimensions, style of printing, or other formal defect, or through having been deposited in the wrong ballot box, but all of such ballots shall be canvassed and

returned as if such formal defect had existed, or as if they had been deposited in the box provided for the purpose. Upon the canvass of such votes by the board of county canvassers of the county in which such city is located, it shall be the duty of said board to file with the county clerk of said county a statement which shall declare the total number of votes cast in said city "for municipal construction of rapid transit road," and the total number so cast therein "against municipal construction of rapid transit road." And the said railway or railways shall be constructed by the said city and at the public expense, if it shall be found from such statements so filed that there is a majority of the votes so cast in favor of such municipal construction.

§ 13. Construction of road — Letting of contracts — Approval by corporation counsel.—In case the majority of votes cast at such election shall be in favor of such municipal construction of said railway or railways, it shall be the duty of said board of rapid transit railway commissioners within thirty days after the official declaration of the said vote to proceed to construct the said railway or railways, and to make and let all contracts required for the performance of the work necessary to be done and performed in and about the construction thereof. All such contracts must, before execution, be approved as to form by the counsel to the corporation, or other chief legal adviser for said city.

§ 14. Time of taking effect.—This act shall take effect immediately; except that the building of said road, or the sale of the franchises as provided for in sections seven and thirty-four of the act hereby amended, as so amended, is postponed until, and made dependent upon, the determination of that question by the vote of the people as called for by sections twelve and thirteen of this act.

LAWS OF 1906, CHAPTER 472.

§ 14. Effect of amendments.—Nothing in this act contained shall repeal, modify or alter any provision of the act hereby amended in respect of any railway or railways constructed, constructing or contracted for thereunder when this act takes effect; but the act hereby amended shall be and continue in full force and effect in respect of such railway or railways so constructed, constructing, or contracted for, as if this act had not been passed.

LAWS OF 1906, CHAPTER 109.

An act to terminate the use of streets, avenues and public places in the city of New York, in the borough of Manhattan, by railroads operated by steam locomotive power at grade.

Became a law March 26, 1906, with the approval of the Governor. Passed, three-fifths being present.

Accepted by the city.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. General powers of board in terminating operation of railroads in public places.—The board of rapid transit commissioners in and for cities having over one million inhabitants is hereby empowered and directed as speedily as possible to prepare a plan for the removal of the tracks of railways now operated by steam locomotive power, laid on, across, through or along the public streets, avenues, or public parks or places of the city of New York, in the borough of Manhattan, at grade; and to terminate the operation thereon of any railway by steam locomotive power; and to take such action in that regard as herein provided. In carrying out the duties imposed by this act, said board of rapid transit commissioners and their various officers and agents shall have and enjoy all the powers now conferred on them by chapter four of the laws of eighteen hundred and ninety-one, and also amendments thereto now in force, so far as the same may be applicable to the purpose of this act, together with all the powers which any board, commissioner or public officer now has to regulate the manner of exercise on, across, through or along such streets, avenues, or public parks or places of any public franchise heretofore granted to any such steam railway company, including the right to regulate or require changes to be made for the public convenience or benefit in the use of such streets, avenues, public parks or places by such railroad company, and all other powers in that regard expressed or implied in any such franchise granted to any such railway company so operated to operate a railroad on, across, through or along avenues, streets, or public parks or places of the borough of Manhattan.

§ 2. Plan and agreement.—The said board of rapid transit commissioners is hereby empowered and instructed to prepare a plan and make an agreement with any railroad company or companies now so operating

a railroad by steam locomotive power in the borough of Manhattan, in the city of New York, which railroad is now operated at grade as aforesaid in said borough, said plan and agreement to provide in detail for the construction by the railroad company or companies at its or their own cost of a subway under the roadbed of the present tracks or under such other street or streets, avenues or public or private property as may be agreed upon, to which said tracks shall be removed and on which shall be operated, subject to the regulation of the board of rapid transit commissioners, a freight, passenger or freight and passenger railway business under a franchise, the term and duration whereof shall be in such agreement fixed and determined, and such plan and agreement further to provide that as a condition of said agreement and as a part of the consideration therefor, all present franchises of every kind on, across, through and along such streets, avenues and public parks and places where said railroad is so operated by such steam locomotive power at grade shall be surrendered and canceled and the tracks thereof shall at the cost of the railroad company or companies be removed therefrom and that the right and franchise to operate said railroad thereon shall cease. The board of rapid transit commissioners may grant to said company or companies an additional franchise to lay in said subway such additional tracks as may be agreed upon and to operate thereon a freight, passenger or freight and passenger business, under such terms and for such compensation as shall be fixed by said board in said grant. It shall be further stipulated in said agreement that the consent of the board of rapid transit commissioners shall be obtained and proper compensation be fixed by said board as a condition to said company or companies making any connection or connections between said subway and other subways, to be owned or occupied by said company or companies or by any other company or companies.

§ 3. Construction of pipe-galleries — Interference with sewers, water pipes, etc., in constructing subway — When agreements take effect — Enforcement.—The board of rapid transit commissioners may further provide in said plan for the construction of such pipe galleries in, along and through said subway as they may deem necessary for the public use; and provide for the expense of constructing the same to be borne by the city of New York, said pipe galleries to be and remain the property of the city of New York. If the board of estimate and apportionment shall provide for the construction of pipe galleries to contain sewers, pipes or other subsurface structures, the said galleries shall be maintained by the city of New York and shall be in the care and charge of the said board and subject to such regulations as it shall prescribe not inconsistent with the provisions of this act, and any revenue derived therefrom shall be paid into the treasury of said city. Provided, however, that any person or

corporation who or which, at the time of the construction of the said galleries shall own pipes, subways or conduits in a street, avenue or public place in which said galleries shall be constructed pursuant to this act, shall be entitled to the use of such galleries for his or its said pipes, subways or conduits in the same manner as the said person or corporation shall be entitled by law to the use of such street, avenue or public place, and that no rent shall be charged for such use, except a reasonable charge to defray the actual cost of maintenance, unless such pipes, subways or conduits shall be of a greater capacity than those theretofore owned by such person or corporation in said street, avenue or public place, and that, if the capacity of any such pipe, subway or conduit so placed in the said galleries shall be increased, the rent shall be charged only for such increased capacity; and provided, further, that the placing in any such galleries of the subways or conduits of any corporation owning subways or conduits for electrical conductors, shall not in any wise affect the right of such corporation to charge and demand such compensation or rent for the use of said subways or conduits by other corporations or individuals as is, or may be, permitted by law. Whenever the construction of any railway, depressed way, subway or tunnel under the provisions of this act shall interfere with, disturb or endanger any sewer, water pipe, gas pipe, or other duly authorized subsurface structures, the work of construction at such points shall be conducted in accordance with the reasonable requirements and under the supervision of the officer or local authority having the care of and the jurisdiction or control over such subsurface structures so interfered with, disturbed or endangered. All expenses incidental to such supervision and to the work of reconstructing, readjusting and supporting any such sewer, water pipe, gas pipe or other duly authorized subsurface structure shall be borne and paid by the railroad company or companies now operating such railroad by steam locomotive power. Said plan shall provide further, the time within which such work shall be done which shall be under the supervision and the control of the board of rapid transit commissioners. The board of rapid transit commissioners shall prepare such plan, and the maps and drawings necessary thereto as speedily as possible. No agreement for the changes proposed by this act or for the plan herein provided for, shall be binding or take effect until the contract, the said plan and the maps in connection therewith, prepared by and under the direction of the board of rapid transit commissioners, shall have been submitted to the board of estimate and apportionment of the city of New York and shall have been approved by said board. Upon said approval, the said contract may be executed by the board of rapid transit commissioners and said railroad company or companies and shall thereupon be binding upon the city of New York, upon said board of rapid transit commissioners and upon said

railroad company or companies. After said contract shall have gone into effect, the enforcement thereof and of the several provisions therein contained shall be a part of the duties of said board of rapid transit commissioners, which shall in its own name take such proceedings in law or in equity as may be from time to time necessary to enforce the same.

§ 4. Condemnation of rights, privileges and franchises.—In case the board of rapid transit commissioners shall be unable within twelve months after this act takes effect to agree as herein provided with such railroad company upon a plan as contained in the preceding section and obtain the approval thereof of the board of estimate and apportionment, the said board of rapid transit commissioners shall thereupon condemn all and any rights, privileges and franchises of any such railway company or companies to operate by locomotives using steam or other power cars or trains for carrying freight and passengers at grade on, across, through or along streets, avenues, public parks or places of the city of New York, borough of Manhattan and cause the tracks of such railroad or railroads to be removed therefrom. It shall cause to be prepared three similar maps or plans showing the streets, avenues, public parks and places on which any such railroad company now operates or has any franchise or right to operate such steam railway at grade in said city and borough and showing the location thereon of the tracks, if any, of such railway whose tracks or appurtenances or whose right to conduct such railway are to be so condemned as herein provided. Such maps or plans when adopted and approved by said board shall be disposed of in like manner as maps or plans of property to be condemned under the provisions of chapter four of the laws of eighteen hundred and ninety-one as amended; and the provisions of said chapter relative to the condemnation of property for public use, so far as the same may be applicable and not in conflict with the provisions of this act, shall apply to the proceedings to be had hereunder. Said board shall after the filing of said maps or plans direct the counsel to the corporation of the city of New York to take legal proceedings to acquire by condemnation all such valid or lawful franchises of any such company operating such railway in said city, and the tracks and appurtenances thereof in such public streets, avenues, public parks or places as shown in said map or plans. Said counsel to the corporation shall thereupon cause to be served on the president or other officer upon whom a summons against such corporation might be served in an action of the railway corporation or corporations whose franchises or right to operate such railway or railways is to be condemned, or whose tracks or property is to be affected by such proceeding, ten days prior to the date on which the same is made returnable, notice of an application for the appointment of commissioners for the condemnation of such franchise or franchises

and of such tracks or appurtenances thereto, and shall accompany such notice with a copy of a petition signed by a majority of the members of said board and verified in the manner prescribed by law for the verification of pleadings, setting forth the action or determination theretofore taken or had by said board in respect to the franchises, rights, privileges or property to be acquired, and the filing of said maps or plans and praying for the appointment of said commissioners of appraisal for the purpose of condemning terminating and acquiring such franchises, rights, privileges and property therein specified. Said petition shall contain a general description of the franchises, grants, easements, tracks, properties or appurtenances sought to be acquired or extinguished and such notice, so served, shall be sufficient notice to such corporation without publication thereof. Said application shall be made to the supreme court at a special term in the judicial district in which said city is situated. The provisions of chapter four of the laws of eighteen hundred and ninety-one as amended relative to the acquisition of property for public uses thereunder shall apply to such application, and to the appointment, powers, procedure, compensation and report of the commissioners and other public officers acting for the purpose of such condemnation under this act. Said commissioners shall take testimony and shall make a report with all convenient speed, which report shall include, among other matters deemed to be relevant and proper in such report, a statement of the source, nature and extent of each franchise, privilege or right lawfully possessed by such railway company or companies as found by them and condemned and terminated in such proceeding, the value thereof and, if more than one franchise, they shall state such values separately, a statement of the tracks, property and appurtenances so condemned and the value thereof. Such report shall fix the compensation if any, which the commissioners find to be reasonable and proper to be made to such railway company or companies for such franchise so condemned and terminated and for the tracks, property and appurtenances thereto so taken and condemned. Notice of an application to confirm such report may be given by any party thereto, by serving a copy of said report on the attorney or attorneys for the railroad corporation or corporations or upon the counsel to the corporation with notice that an application shall be made for such confirmation to the supreme court not less than ten days thereafter at a time and place therein provided and no publication of notice or of the filing of such report shall be required.

§ 5. Termination of rights of companies — Powers during proceedings — Expenses of proceedings.—No such franchise shall terminate nor shall the right, title or interest of such railroad company or companies in the same or in the tracks, properties or appurtenances to be condemned and acquired in such proceeding, cease or terminate until

the entry of a final order made by the supreme court confirming the report of such commissioners and the court on making such order shall fix a date not more than one year thereafter on which the right to operate such railway or exercise such franchise and to use such tracks, property or appurtenances shall cease and determine, and in case an appeal be taken from such order of confirmation such time shall be further extended for a like period after the entry of an order of affirmance on such appeal. During such period it shall be lawful for such railroad company or companies to continue the use of such franchise or franchises or of the tracks, property or appurtenances sought to be condemned or acquired, as if no such proceeding had been instituted. The award, if any, made to such commissioners and confirmed by said court shall become payable on the expiration of such period with interest thereafter, and such award with the cost and expenses incident to such proceeding shall be borne and paid by the city of New York by the issue and sale of corporate stock of the city of New York, and the board of estimate and apportionment shall be authorized to issue and sell such stock as shall be necessary for such purpose, in like manner as corporate stock is by law issuable for the payment of damages awarded by commissioners of estimate and assessment in reports confirmed in proceedings taken to open streets, roads, avenues, boulevards or public parks. Such corporate stock may be authorized to be issued by said board without the concurrence or approval of any other public board or body.

§ 6. Discontinuance of proceedings.—The board of rapid transit commissioners is authorized and empowered to discontinue any and all legal proceedings taken under this act for condemning such franchise or franchises and acquiring the tracks, property or appurtenances of such railway company or companies or any part thereof at any time before the confirmation of the report of the commissioners in such proceeding, if, in its opinion, the public interest requires such discontinuance and with power to cause new proceedings to be taken in such cases for the appointment of new commissioners.

§ 7. Effect of act on powers of city officers.—Nothing in this act contained shall be construed in any wise to abridge or affect the powers of the city of New York or of any proper and authorized board of public officer of said city to prevent the unlawful use by any railway company or corporation or any street, avenue, public park or place in said city.

§ 8. **Act not applicable to certain railroads.**—Nothing in this act contained shall be held to affect or apply in any way to a corporation operating a steam surface railroad in the city of New York for the purpose only of transporting freight from its wharves, docks or piers to its freight yards or depots in said city over tracks not more than one-half mile in length.

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BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS.

1. General provisions.
2. Membership.
3. Salary and expenses.
4. Organization and procedure.
5. General powers.
6. Condemnation proceedings.
7. Removal of steam railway tracks from grade.
8. Rapid transit railway, construction of, by private corporation.
 - (a) *Preliminary steps.*
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 - (c) *Powers and liabilities of corporation.*
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10. Rapid transit railway, construction of, at public expense.
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If board ceases to exist, legislature may provide what officer shall exercise its powers and duties, § 34c, pp. 740-742.
 2. Membership.

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Shall include mayor and comptroller of city, § 1, pp. 703, 704.

William Steinway, Seth Low, John Clafin, Alexander E. Orr, and John H. Starin, specifically named, § 1, pp. 703, 704.

Members shall be citizens of United States and State of New York, and *bona fide* residents of city, § 1, pp. 703, 704.

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 3. Salary and expenses.

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May apply to supreme court if its requisitions are not honored, § 10, pp. 714-716.

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4. Organization and procedure.

Organization must take place within twenty days after filing of oaths of office, § 3, p. 704.

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Four members shall constitute a quorum for transaction of business, but fewer may adjourn meetings, § 3, p. 704.

Shall adopt a seal, § 3, p. 704.

Shall keep a record of its proceedings, which shall be a public record, open to inspection at all reasonable times, § 3, p. 704.

May rent offices and employ engineers, attorneys, etc., § 9, p. 714.

Must publicly advertise for proposals before awarding contracts, § 36, pp. 743, 744.

Whenever it is expressly provided in this act (§§ 4, 11, 14, 20) that any act of the board of rapid transit commissioners may be done by concurrent vote of four members, the act is hereby amended to require the vote of six members. L. 1894, ch. 752, § 10, p. 761.

All contracts for construction, etc., must be approved, as to form, by corporation counsel, L. 1894, ch. 752, § 13, p. 763.

5. General powers.

Shall have and exercise specific authority and powers conferred by the act, and such other and necessary powers as may be requisite to the efficient performance of the duties imposed on said board by the act, § 1, pp. 703, 704.

May sue in the name and in behalf of the city, § 7, pp. 711–713.

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May rent such offices and employ such engineers, attorneys and other persons as it may deem necessary, § 9, p. 714.

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If board ceases to exist, legislature may provide what officer shall exercise its powers and duties, § 34c, pp. 740-742.

To condemn land, etc., § 39, pp. 747-749.

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Board may authorize trunk line railroad to build, § 32, pp. 725-728.

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Amount of, outstanding of rapid transit corporation shall not exceed limit fixed by articles of association, § 24, subd. 6, p. 723.

Rentals to city under contract to operate railways built at public expense shall not be less than interest on bonds issued by city for such road, § 34a, pp. 735-739.

Sinking fund for payment of, issued by city to build railways, § 34a, pp. 735-739.

BONDS — Continued:

Fares on rapid transit railways shall be adjusted to provide sinking fund to pay, § 34d, pp. 742, 743.

City shall issue, to pay for construction and operation of railways, § 37, pp. 744, 745.

Form and contents of, issued for railways built at public expense, § 37, pp. 744, 745.

Issued for railways built at public expense, shall be exempt from local taxation, § 37, pp. 744, 745.

BOOKS.

Subscription books for capital stock of rapid transit corporation shall be publicly opened by board, § 11, p. 716.

BOOKS AND PAPERS.

Of corporation must be exhibited at meeting to elect directors, if majority of stockholders present so require, § 16, p. 719.

BRAKEMEN.

Shall wear badges, § 25, p. 723.

BRIDGE COMPANY.

Construction of elevated railroad by, in place of approaches to bridges, § 38a, pp. 746, 747.

BRIDGES.

Construction of elevated railroads in place of approaches to, § 38a, pp. 746, 747.

BUILDINGS.

Of rapid transit railway, board may locate and make specifications for, § 6, pp. 709-711.

Wilful obstruction, weakening, injury or destruction of, owned by rapid transit railway a misdemeanor, § 30, pp. 724, 725.

Railway corporation owning, entitled to treble damages for wilful injury to, § 30, pp. 724, 725.

BY-LAWS OF RAPID TRANSIT CORPORATION.

Shall be adopted at first meeting of subscribers, § 12, p. 717.

Shall not be inconsistent with this act, § 12, p. 717.

Shall fix term of office of directors, not to exceed one year, § 12, subd. 1, p. 717.

Shall provide manner of filling vacancies in any office or in board of directors, § 12, subd. 2, p. 717.

Shall provide time and place of annual meeting of stockholders, § 12, subd. 3, p. 717.

Shall provide manner of calling and holding special meetings of stockholders, § 12, subd. 4, p. 717.

Shall provide number of stockholders who shall constitute a quorum, § 12, subd. 5, p. 717.

Shall provide for officers of corporation, § 12, subd. 6, p. 717.

Officers of corporation shall include a president, secretary, and treasurer, § 12, subd. 6, p. 717.

BY-LAWS OF RAPID TRANSIT CORPORATION — Continued:

Shall provide for officers of corporations, § 12, subd. 6, p. 717.

Shall provide powers and duties of officers, § 12, subd. 6, p. 717.

Shall provide manner of electing or appointing inspectors of election, § 12, subd. 7, p. 717.

Shall provide manner of their amendment, § 12, subd. 8, p. 717.

May provide for forfeiture of shares for non-payment of calls, § 12, p. 717.

May provide for such other matters as may be deemed proper by board, § 12, p. 717.

Must be approved by resolution of board, § 12, p. 717.

Copy of, shall be filed within ten days, § 13, pp. 717, 718.

Vacancies in board of directors shall be filled as prescribed by, § 16, p. 719.

Transfers of stock shall be as prescribed by, § 19, p. 720.

CALLS.

By-laws of rapid transit corporation may provide for forfeiture of shares for non-payment of, § 12, p. 717.

Stock shall not be transferable till all previous calls thereon have been fully paid in, § 19, p. 720.

CAPITAL STOCK OF RAPID TRANSIT CORPORATION.

Amount of, must be fixed by terms of sale of franchise, § 7, pp. 711-713.

Successful bidders for franchise shall have preference in allotment of, § 11, p. 716.

Subscription books for, shall be publicly opened by board, § 11, p. 716.

Must be subscribed by at least fifty persons, § 11, p. 716.

Each director shall be a holder in his own right of one hundred shares of, § 11, p. 716.

Board shall fix percentage of, to be paid in at organization, § 11, p. 716.

Each share of, shall entitle holder to one vote for each director, § 12, p. 717.

By-laws may provide for forfeiture of shares of, for non-payment of calls on, § 12, p. 717.

By-laws of corporation shall provide time and place of annual meeting of stockholders, § 12, subd. 3, p. 717.

At organization, shall pay tax of one-eighth of one per centum on par value, § 13, pp. 717, 718.

Percentages paid in on subscription to, when to be turned over to corporation, § 13, pp. 717, 718.

On election of directors, each stockholder shall be entitled to one vote for each share of, held by him, § 16, p. 719.

Directors may compel, and fix terms of, payment for, § 17, p. 719.

Shall be deemed personal estate, § 19, p. 720.

CAPITAL STOCK OF RAPID TRANSIT CORPORATION — Con.:

Shall be transferable as prescribed in by-laws, § 19, p. 720.

Shall not be transferable until all previous calls thereon shall have fully been paid in, § 19, p. 720.

Increases or reduction in, § 20, p. 720.

Two-thirds of stockholders must approve increase or reduction in, § 20, p. 720.

Stockholders entitled to written notice of meeting to vote on increase or reduction of, § 20, p. 720.

Board shall approve and attest statement of increase and reduction in, § 20, p. 720.

Statement of increase or reduction of, shall be filed with secretary of state and county clerk, § 20, p. 720.

Persons holding, in a fiduciary capacity or for collateral security not personally liable as stockholders, § 21, pp. 720, 721.

CARS.

Shall be started and run at regular times, § 28, p. 724.

Regular times to run shall be fixed by public notice, § 28, p. 724.

CENSUS.

Last preceding state or national, shall determine which cities have over 1,000,000 inhabitants, § 1, pp. 703, 704.

CERTIFICATE OF MODIFICATIONS.

See "MODIFICATIONS, CERTIFICATE OF."

CERTIFICATE OF ORGANIZATION.

Shall be filed with secretary of state and duplicate with county clerk, § 13, pp. 717, 718.

Duly certified copy thereof presumptive proof of due organization of corporation, § 13, pp. 717, 718.

CERTIFICATES.

Of board shall be attested with its seal and signature of its presiding officer, § 13, pp. 717, 718.

CHAMBER OF COMMERCE.

President of, of New York State, *ex officio* a member of board of rapid transit commissioners, § 1, pp. 703, 704.

CITY.

Of more than one million inhabitants, shall have board of rapid transit railroad commissioners, § 1, pp. 703, 704.

Mayor and comptroller of, shall be *ex officio* members of board of rapid transit commissioners, § 1, pp. 703, 704.

Mayor of, shall fill vacancies in board, after January 1, 1906, § 1, pp. 703, 704.

Board may sue in name and in behalf of, § 9, p. 714.

CITY — Continued:

Shall not tax rapid transit railways in process of construction, § 15, p. 719.

Rapid transit corporation shall be taxed on its property in city where its railways are located, § 15, p. 719.

Streets, etc., and plant and structure of railway, shall become property of, on expiration of franchise, § 32a, pp. 728-731.

May acquire rolling stock at fair valuation, when franchise expires, § 32a, pp. 728-731.

Effect of consolidation of, with other cities or territory, § 34, pp. 733-735.

Vote of people for construction of railways at expense of, § 34, pp. 733-735.

May purchase railways built at public expense, at expiration of twenty years, § 34a, pp. 735-739.

Protection of contractor by, § 34c, pp. 740-742.

Payment of awards of commissioners of appraisal protects, § 56, p. 757.

Railway voted by people to be constructed at expense of, shall remain absolute property of, § 63, p. 760.

CLAIMS.

Commissioners of appraisal may hear and determine, § 48, pp. 753, 754.

Limitation of time for presentation of, to commissioners of appraisal, § 55, pp. 756, 757.

CLERKS.

Commissioners of appraisal may appoint, § 62, p. 759.

COLLECTOR.

See "CONDUCTOR."

COLUMNS.

Power of rapid transit corporation to erect, § 24, subd. 5, pp. 722, 723.

Surface of streets around, shall be restored to former condition, § 24, subd. 5, pp. 722, 723.

COMMERCE.

President of New York State Chamber of, *ex officio* a member of board, § 1, pp. 703, 704.

COMMISSIONER OF PUBLIC WORKS.

Construction endangering sewers, water pipes, and other subsurface structures shall be conducted in accordance with reasonable requirements of, § 6, pp. 709-711.

COMMISSIONERS.

Governor of state may appoint three, to fix rates for carrying mail, § 26, pp. 723, 724.

COMMISSIONERS OF APPRAISAL.

See "CONDEMNATION PROCEEDINGS."

COMMISSIONERS OF RAPID TRANSIT.

See "BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS."

COMMISSIONERS, SUPREME COURT.

See also "BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS;"

"CONSENTS;" "PROPERTY-HOLDERS;" "RAILWAY, RAPID TRANSIT."

Application for, and manner of appointment of, § 5, pp. 706-708.

How vacancies in, may be filled, § 5, pp. 706-708.

Appellate division shall act upon the report of, § 5, pp. 706-708.

Determination of, in lieu of property-owners' consent for tunnel railroad or trunk-line extensions, § 32, pp. 725-728.

COMMON CARRIER.

See also "CORPORATION, RAPID TRANSIT RAILROAD;" "PASSENGERS;"

"PROPERTY;" "RAILWAY, RAPID TRANSIT."

Duties of railway as, § 24, subd. 4, p. 722; § 25, p. 723; § 26, pp. 723, 724; § 28, p. 724; § 34d, pp. 742, 743.

COMMON COUNCIL.

Approval of construction of elevated railroads in place of bridge approaches, § 38a, pp. 746, 747.

COMPANY.

See "CORPORATION."

COMPENSATION.

Rapid transit commissioners other than mayor and comptroller shall receive reasonable compensation fixed by supreme court, § 10, pp. 714-716.

Rapid transit commissioners shall furnish vouchers to comptroller for payment of their, § 10, pp. 714-716.

Corporations shall agree on, for connecting facilities, etc., § 24, subd. 3, p. 722.

Court shall fix, for intersections, if corporations cannot agree, § 24, subd. 3, p. 722.

Rapid transit corporation may receive, for conveying persons and property, § 24, subd. 4, p. 722.

To city for franchise for extensions, etc., board shall fix, § 32, pp. 725-728.

Railroad extending lines within city shall pay, § 32, pp. 725-728.

To city under contracts for operation of railways built at public expense, § 34a, pp. 735-739.

Shall not be reduced by modifications of contract to operate railroad built at public expense, § 38, pp. 745, 746.

Limitation of time for presentation of claims for, to commissioners of appraisal, § 55, pp. 756, 757.

COMPENSATION — Continued:

Payment of awards of commissioners of appraisal protects city, § 56, p. 757.

Of commissioners of appraisal, how ascertained and paid, § 62, p. 759.

COMPTROLLER.

He or other chief financial officer of city shall be *ex officio* a member of board of rapid transit commissioners, § 1, pp. 703, 704.

He or other chief financial officer of such city need not take oath of office as commissioner of rapid transit, § 2, p. 704.

Duty to pay appropriations duly made for board, § 10, pp. 714-716.

Authorized to issue and sell revenue bonds to pay appropriations made under this act, § 10, pp. 714-716.

CONDEMNATION PROCEEDINGS.**1. In general.**

Rapid transit corporation may acquire real estate under condemnation law, § 23, p. 721.

Board may enter upon, to secure necessary real estate, etc., § 39, pp. 747-749.

Board may direct corporation counsel to start, § 41, p. 750.

Preparation and filing of maps used in, § 42, p. 750.

Entry upon property under, § 47, pp. 752, 753.

When city shall become seized of property indicated on maps in, § 47, pp. 752, 753.

All property acquired under this act shall be deemed to be for public use to afford increased facilities for rapid transit, § 60, pp. 758, 759.

Money spent in acquiring property by, how raised and paid, § 61, p. 759.

Expenses of, shall be taxed before a justice of the supreme court, § 62, p. 759.

2. Commissioners of appraisal.

Petition for appointment of, § 43, pp. 750, 751.

Notice of application for appointment of, § 44, p. 751.

Order of appointment of, § 45, pp. 751, 752.

Qualifications of, § 45, pp. 751, 752.

Oath of, § 46, p. 752.

May issue subpoenas and administer oaths, § 48, pp. 753, 754.

May hear and determine claims, § 48, pp. 753, 754.

Appointment of, to fill vacancies, § 48, pp. 753, 754; § 59, p. 758.

Proceedings to determine compensation to property-owners, § 48, pp. 753, 754.

Testimony before, shall be reduced to writing, § 48, pp. 753, 754.

CONDEMNATION PROCEEDINGS — Continued:**Commissioners of appraisal** — Continued:

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Hearing on confirmation of report of, § 52, p. 755.

Limitation of time for presentation of claims to, § 55, pp. 756, 757.

Reports of, may be separate on specified claims, § 57, p. 757.

Supreme court may correct defects or informality in proceedings of, § 59, p. 758.

Court may remove unfit or incapable commissioners, § 59, p. 758.

May hire necessary clerks, stenographers and surveyors, § 62, p. 759.

Compensation and disbursements of commissioners, how ascertained and paid, § 62, p. 759.

3. Awards.

Payment of awards shall be made within four months, § 53, p. 755.

Payment of awards to infant, or absent or unknown owner, § 54, p. 756.

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Payment of awards protects city, § 56, p. 757.

Appeal from award of, § 58, pp. 757, 758.

Award of second appraisal, after appeal, shall be final and conclusive, § 58, pp. 757, 758.

Appeal from award shall be on testimony taken before commissioners of appraisal, § 58, pp. 757, 758.

Taking of an appeal shall not stay procedure under this act except as to the particular act, § 58, pp. 757, 758.

CONDUCTOR.

Of passenger train shall wear a badge, § 25, p. 723.

May eject passenger refusing to pay fare, § 27, p. 724.

Intoxication of, while in charge of train a misdemeanor, § 29, p. 724.

CONDUITS.

Electrical, may not be permanently removed by rapid transit railway without consent of owner, § 33, pp. 731-733.

Underground, may be temporarily removed during construction of railway, § 33, pp. 731-733.

Board may condemn necessary property to build, § 39, pp. 747-749.

Board may construct, in building subway of railroad formerly operated at surface, L. 1906, ch. 109, § 3, pp. 765-767.

CONNECTING RAILROAD.

See "RAILWAY, RAPID TRANSIT."

CONNECTIONS.

Board may locate and make specifications for, between railways, § 6, pp. 709-711.

What company may do to further, § 24, subd. 3, p. 722.

Board shall determine points and manner of, if corporations cannot agree, § 24, subd. 3, p. 722.

Court shall fix compensation for, if corporations cannot agree, § 24, subd. 3, p. 722.

CONSENTS.

See also "BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS;" "COMMISSIONERS;" "RAILWAY, RAPID TRANSIT."

Local authorities and the owners of one-half in value of property bounded by any route shall give, or commissioners' proceedings in lieu of consents, by property-owners, § 4, pp. 704-706.

Mayor and board of estimate and apportionment constitute local authorities for giving consents thereof under this act, § 5, pp. 706-708.

Judicial proceedings in lieu of, by property-owners, § 4, pp. 704-706; § 5, pp. 706-708.

Manner of obtaining, of abutting property-owners to any plan of construction, § 4, pp. 704-706; § 5, pp. 706-708.

Manner of obtaining, of board of estimate and apportionment to any plan of construction, § 5, pp. 706-708.

Tunnel railroad or trunk-line extensions, consent of owners of one-half in value of property bounded on, must be obtained, § 32, pp. 725-728.

Tunnel railroad or trunk line extensions, determination of supreme court commissioners in lieu of property-owners' consents, § 32, pp. 725-728.

To the erection of elevated railroads in place of bridge approaches, § 38a, pp. 746, 747.

CONSOLIDATION.

Effect of, of one or more cities or other territory, one of whom has board, § 34, pp. 733-735.

CONSTRUCTION.

See also "CORPORATION, RAPID TRANSIT RAILWAY;" "RAILWAY, RAPID TRANSIT."

Wilful stoppage of, or injury to, of rapid transit railway, a misdemeanor, § 30, pp. 724, 725.

Railway entitled to treble damages for wilful injury to, § 30, pp. 724, 725.

Contents of bond and contract for, of railways built at public expense, § 34b, pp. 739, 740; § 34c, pp. 740-742.

CONSTRUCTION OF ACT.

See "ACT."

CONSTRUCTION, PLAN OF.

See also "BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS;"
"CONSTRUCTION;" "PLANS;" "RAILWAY, RAPID TRANSIT."

Must show any street, avenue or public place affected and abutting property affected, § 4, pp. 704-706.

CONTINUOUS LINE.

Tunnel railroad authorized to form, § 34, pp. 733-735.

CONTRACTOR.

Stockholder not personally liable for corporate debts to, § 18, pp. 719, 720.

Corporation liable to laborers of, § 22, p. 721.

On rapid transit railway, may erect temporary tramways to facilitate construction, § 33, pp. 731-733.

CONTRACTS.

See also "BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS;"
"CORPORATION, RAPID TRANSIT RAILROAD;" "RAILWAY, RAPID TRANSIT."

For construction of railways authorized by vote of people, provisions and letting of, § 34, pp. 733-735; § 34c, pp. 740-742.

Board shall award, only after public notice, § 36, pp. 743, 744.

Board shall hold hearing of citizens on, before letting, to build railways at public expense, § 37, pp. 744, 745.

Modifications in, for construction or operation of railways, § 38, pp. 745, 746.

All, for construction of railways, must be approved as to form, by corporation counsel, L. 1894, ch. 752, § 13, p. 763.

CONVENIENCES.

Rapid transit railway may provide, in furtherance of the objects of its connections, § 24, subd. 3, p. 722.

CONVEYANCE.

See "PASSENGERS;" "PROPERTY;" "RAILWAY, RAPID TRANSIT."

CORPORATION COUNSEL.

Board may direct, to start condemnation proceedings, § 41, p. 750.

Shall present report of commissioners of appraisal to supreme court for confirmation, § 51, pp. 754, 755.

May designate counsel to represent city in condemnation proceedings, § 62, p. 759.

All contracts for construction of railways must be approved as to form by, L. 1894, ch. 752, § 13, p. 763.

CORPORATION, RAPID TRANSIT RAILROAD.

See also "CAPITAL STOCK;" "FRANCHISES;" "RAILWAY, RAPID TRANSIT."

- 1. Organization.**
- 2. Officers and election thereof.**
- 3. By-laws.**
- 4. Stock and stockholders.**
- 5. Rights, duties and liabilities.**
- 6. Employees.**
- 7. Dissolution.**

1. Organization.

Articles of association must be approved by board, § 11, p. 716.

Articles of association for rapid transit corporation must be attested with seal of board and signature of presiding officer, § 11, p. 716.

Articles of association must be filed in office of secretary of state; duplicate must be filed in office of county clerk, § 11, p. 716.

Successful bidders for franchise shall be given preference in allotment of capital stock of, § 11, p. 716.

Board shall call meeting of subscribers to organize, § 11, p. 716.

Record of proceedings at first meeting of subscribers to stock of, shall be filed, § 13, pp. 717, 718.

Board shall certify that corporation has been organized in accordance with this act, § 13, pp. 717, 718.

Certificate of organization and record of proceedings at first meeting of, shall be filed with secretary of state and duplicate with county clerk, § 13, pp. 717, 718.

At organization corporation shall pay tax of one-eighth of one per centum on par value of its capital stock, § 13, pp. 717, 718.

When organization is deemed completed, § 13, pp. 717, 718.

How organization may be proved in court, § 13, pp. 717, 718.

Board may authorize, to alter or add to detailed specifications in its articles, § 14, p. 718.

Principal offices shall be in city where railways are located, § 15, p. 719.

Tunnel railroad, board may grant franchise for, on application, § 32, pp. 725-728.

2. Officers and election thereof.

Directors shall be thirteen in number, § 12, p. 717.

Directors shall be elected at first meeting of subscribers, § 12, p. 717.

CORPORATION, RAPID TRANSIT RAILROAD — Continued:**Officers and election thereof — Continued:**

- Directors shall each be a holder in his own right of one hundred shares of capital stock, § 12, p. 717.
- Board shall appoint inspectors for first election of directors, § 12, p. 717.
- Each share of stock shall entitle holder to one vote for each director, § 12, p. 717.
- Directors first elected shall hold office for one year or until successors are chosen, § 12, p. 717.
- Officers shall include a president, secretary and treasurer, § 12, subd. 6, p. 717.
- Directors shall be chosen annually, § 16, p. 719.
- Majority vote of stockholders shall elect directors, § 16, p. 719.
- In election of directors of, each stockholder shall be entitled to one vote for each share of stock held by him, § 16, p. 719.
- No person shall be director of, unless he shall be a stockholder owning one hundred shares absolutely in his own right, § 16, p. 719.
- No person shall be director unless he shall be qualified to vote for directors at the election at which he shall be chosen, § 16, p. 719.
- Directors shall continue to be directors until others are elected in their places, § 16, p. 719.
- Vacancies in board of directors shall be filled as prescribed by by-laws of, § 16, p. 719.
- Directors shall manage affairs of corporation, § 16, p. 719.
- Majority of stockholders present may require exhibition of books and papers at meetings to elect directors, § 16, p. 719.
- Directors shall fix terms for payments on capital stock, § 17, p. 719.

3. By-laws.

- Shall be adopted at first meeting of subscribers, § 12, p. 717.
- May provide for forfeiture of shares for non-payment of calls, § 12, p. 717.
- Must be approved by resolution of board, § 12, p. 717.
- Shall fix term of office of directors, not to exceed one year, § 12, subd. 1, p. 717.
- Shall provide manner of filling vacancies in any office or in board of directors, § 12, subd. 2, p. 717.
- Shall provide time and place of annual meeting of stockholders, § 12, subd. 3, p. 717.
- Shall provide manner of calling and holding special meetings of stockholders, § 12, subd. 4, p. 717.
- Shall provide how many stockholders in person or by proxy

CORPORATION, RAPID TRANSIT RAILROAD — Continued:**By-laws** — Continued:

- shall constitute a quorum at any stockholders' meeting, § 12, subd. 5, p. 717.
- Shall provide for the officers, § 12, subd. 6, p. 717.
- Shall provide manner of electing officers, § 12, subd. 6, p. 717.
- Shall provide powers and duties of officers, § 12, subd. 6, p. 717.
- Shall provide manner of electing or appointing inspectors of election, § 12, subd. 7, p. 717.
- Shall provide manner in which they shall be amended, § 12, subd. 8, p. 717.
- May provide for such other matters as may be deemed proper by board, § 12, p. 717.

4. Stock and stockholders.

- Capital stock must be subscribed by at least fifty persons, § 11, p. 716.
- Payment of percentages paid in on capital stock subscribed, § 13, pp. 717, 718.
- Liability of stockholders to creditors, § 18, pp. 719, 720.
- Stockholder who has had to pay its labor debts may recover from other stockholders in ratable proportion to their holdings, § 18, pp. 719, 720.
- Stock shall be deemed personal estate, § 19, p. 720.
- Stock shall be transferable as prescribed in by-laws, § 19, p. 720.
- Stock shall not be transferable till all previous calls thereon have been paid in, § 19, p. 720.
- May increase or reduce its capital stock upon approval of board, § 20, p. 720.
- Two-thirds of stockholders must approve increase or reduction in capital stock, § 20, p. 720.
- President and majority of directors shall sign statement of increase or reduction of capital stock, § 20, p. 720.
- Stockholders entitled to written notice of meeting to vote on increase or reduction of capital stock, § 20, p. 720.
- Statement of increase or reduction in capital stock shall be filed with secretary of state and county clerk, § 20, p. 720.
- Persons holding stock in fiduciary capacity or as collateral security not personally liable, § 21, pp. 720, 721.

5. Rights, duties and liabilities.

- Company having franchise for railway shall bear expense of readjusting and supporting sewers, gas pipes and other subsurface structures, § 6, pp. 709-711.

CORPORATION, RAPID TRANSIT RAILROAD — Continued:**Rights, duties and liabilities** — Continued:

Certificate of modifications must be filed with secretary of state and duplicate with county clerk, § 14, p. 718.

Upon filing of certificate of modifications for board and corporation may proceed under altered plans, § 14, p. 718.

Shall be taxed on its property in city where its railways are located, § 15, p. 719.

Not to be taxed on any railway not opened for transportation of property and passengers, § 15, p. 719.

Liable to employees of its contractors, § 22, p. 721.

May acquire and hold necessary real estate, § 23, p. 721.

May proceed to acquire real estate under condemnation law, § 23, p. 721.

May take and hold voluntary grants of real estate and other property, § 24, subd. 1, p. 722.

Real estate received by, by voluntary grant shall be used only for purposes of such grant, § 24, subd. 1, p. 722.

May purchase, lease, hold and use necessary real estate and other property, § 24, subd. 2, p. 722.

May cross, intersect, join and unite its railways with any other, § 24, subd. 3, p. 722.

Whose railways are intersected shall act with owners of new railway in forming such intersections, § 24, subd. 3, p. 722.

Court shall fix compensation for intersections and connections if corporations cannot agree, § 24, subd. 3, p. 722.

May convey persons and property, § 24, subd. 4, p. 722.

May receive compensation for conveying persons and property, § 24, subd. 4, p. 722.

May construct, maintain, operate and use railway, § 24, subd. 5, pp. 722, 723.

Nothing in this act shall authorize crossing of steam railway tracks at grade, by, § 24, subd. 5, pp. 722, 723.

May enter upon and underneath streets and lands, § 24, subd. 5, pp. 722, 723.

May not acquire and use public parks or squares, § 24, subd. 5, pp. 722, 723.

May secure necessary foundations for railways, § 24, subd. 5, pp. 722, 723.

May make necessary excavations along route, § 24, subd. 5, pp. 722, 723.

After excavations by, streets shall be restored to former condition by, under supervision of local authorities, § 24, subd. 5, pp. 722, 723.

May erect piers, § 24, subd. 5, pp. 722, 723.

May erect columns, § 24, subd. 5, pp. 722, 723.

CORPORATION, RAPID TRANSIT RAILROAD — Continued:**Rights, duties and liabilities — Continued:**

May erect other structures which may be required to secure safety and stability, § 24, subd. 5, pp. 722, 723.

Use of streets and lands by, declared a public use, § 24, subd. 5, pp. 722, 723.

May borrow necessary money, § 24, subd. 6, p. 723.

May issue and dispose of bonds, § 24, subd. 6, p. 723.

Bonds of, outstanding shall not exceed amount limited by articles of association, § 24, subd. 6, p. 723.

Shall carry mails when applied to by postmaster-general, § 26, pp. 723, 724.

Commissioners appointed by governor shall fix rates for carrying mail, if parties cannot agree, § 26, pp. 723, 724.

When entitled to receive extra pay for carrying mails, § 26, pp. 723, 724.

Servants of, may eject passenger refusing to pay fare, § 27, p. 724.

Shall start and run its cars at regular times, § 28, p. 724.

Shall furnish sufficient accommodations for the transportation of passengers and property, § 28, p. 724.

Shall be liable to party aggrieved for neglect or refusal, § 28, p. 724.

Wilful stoppage of, or injury to, property of, a misdemeanor, § 30, pp. 724, 725.

Person wilfully injuring or obstructing property of, shall pay treble damages, § 30, pp. 724, 725.

6. Employees.

Must wear badges, § 25, p. 723.

Shall wear initial letter of corporation, § 25, p. 723.

Conductor of, without badge, may not collect fares or tickets, § 25, p. 723.

Without badge, may not interfere with passenger, or his property, § 25, p. 723.

Intoxication of engineer or conductor of train a misdemeanor, § 29, p. 724.

7. Dissolution.

Legislature may annul or dissolve any corporation formed under this act, § 31, p. 725.

Shall not impair remedies for liabilities of, § 31, p. 725.

COUNSEL.

See "ATTORNEYS;" "CORPORATION COUNSEL."

COUNSEL TO THE CORPORATION.

See "CORPORATION COUNSEL."

COUNTY CLERK.

Commissioners' oath of office shall be filed in his office, § 2, p. 704.
Duplicate of articles of incorporation must be filed in office of county clerk, § 11, p. 716.

Duplicate of certificate of organization and record of proceedings at first meeting of subscribers shall be filed in office of, § 13, pp. 717, 718.

Statement of increase or reduction in capital stock must be filed with, § 20, p. 720.

COURT.

See also "BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS;" "COMMISSIONERS, SUPREME COURT;" "CONDEMNATION PROCEEDINGS;" "CONSENTS;" "CORPORATION;" "RAILWAY."

Shall fix compensation for intersections, if corporations cannot agree, § 24, subd. 3, p. 722.

CREDITORS.

Individual liability of stockholders to, of rapid transit corporation, § 18, pp. 719, 720.

CROSS.

Power of rapid transit railway to, over any other railways, § 24, subd. 3, p. 722.

This act shall not authorize rapid transit railway to, steam railway at grade, § 24, subd. 5, pp. 722, 723.

CROSSING.

Board shall determine points and manner of crossing railways if corporations cannot agree, § 24, subd. 3, p. 722.

DAMAGES.

Party aggrieved may recover, for neglect or refusal of corporation to furnish transportation, § 28, p. 724.

Persons wilfully injuring or obstructing railway property shall pay treble, § 30, pp. 724, 725.

By temporary removal of tracks, pipes, sewer, etc., shall be determined by commission, § 33, pp. 731-733.

DEBTS.

Liability of stockholders for corporate, § 18, pp. 719, 720.

DEFECT.

In proceedings of commissioners of appraisal, supreme court may correct, § 59, p. 758.

DESTRUCTION.

Of railway property a misdemeanor, § 30, pp. 724, 725.

Treble damages recoverable for, § 30, pp. 724, 725.

DIRECTORS.

Shall be thirteen in number, § 12, p. 717.

Shall be elected at first meeting of subscribers, § 12, p. 717.

DIRECTORS — Continued:

Shall hold office for one year and until successors are elected, § 12, p. 717.

Each share of stock shall entitle holder to one vote for each director, § 12, p. 717.

Each director shall be a holder in his own right of at least one hundred shares of capital stock of corporation, § 12, p. 717; § 16, p. 719.

Term of office shall be fixed by by-laws, not to exceed one year, § 12, subd. 1, p. 717.

By-laws shall provide manner of filling vacancies in board of, § 12, subd. 2, p. 717.

By-laws of corporation shall provide manner of election of officers of corporation by, § 12, subd. 6, p. 717.

Names of, shall be filed with secretary of state, § 13, pp. 717, 718.

Two-thirds must vote to approve any modifications of specifications in articles of agreement, § 14, p. 718.

Affairs of corporation shall be managed by board of thirteen directors, § 16, p. 719.

Shall be chosen annually, § 16, p. 719.

Shall continue to be directors until others are elected in their places, § 16, p. 719.

Majority vote of stockholders shall elect, § 16, p. 719.

In election of, each stockholder shall be entitled to one vote for each share of stock held by him, § 16, p. 719.

To be elected director, a person must be qualified to vote for directors at the meeting at which he shall be chosen, § 16, p. 719.

Vacancies in board of, shall be filled as prescribed by by-law, § 16, p. 719.

Majority of stockholders present may require exhibition of books and papers at meetings to elect, § 16, p. 719.

Majority of, shall sign statement of increase or reduction in capital stock, § 20, p. 720.

Shall call meeting of stockholders to vote on increase or reduction of capital stock, § 20, p. 720.

Of bridge company, power as to construction of elevated railroad in place of bridge approach, § 38a, pp. 746, 747.

DISSOLUTION.

By legislature, does not impair any remedy against corporation for liabilities previously incurred, § 31, p. 725.

Legislature may dissolve any corporation formed under this act, § 31, p. 725.

EASEMENTS.

Board may acquire, for necessary purposes, § 39, pp. 747-749.

EAST RIVER.

Board may authorize tunnel railroads under, § 32, pp. 725-728.

EFFICIENCY.

Board shall seek to establish the best and most efficient system of rapid transit, in view of the public needs and requirements, § 6, pp. 709-711.

EJECT.

Servants may, passenger who refuses to pay fare, § 27, p. 724.

ELECTION.

Directors of rapid transit corporation shall be chosen at first meeting of subscribers, § 12, p. 717.

Board shall appoint inspectors of first, of directors, § 12, p. 717.

Each share of stock shall entitle holder to one vote for each director, § 12, p. 717.

Each director chosen at, shall be a holder in his own right of one hundred shares of capital stock of the corporation, § 12, p. 717, § 16, p. 719.

By-laws shall fix term of office of directors, not to exceed one year, § 12, subd. 1, p. 717.

By-laws shall provide manner of filling vacancies in any office or in board of directors, § 12, subd. 2, p. 717.

By-laws of corporation shall provide manner of electing its officers, § 12, subd. 6, p. 717.

By-laws of corporation shall provide manner of electing or appointing inspectors of election, § 12, subd. 7, p. 717.

Directors shall be chosen annually, § 16, p. 719.

Directors shall be elected by majority vote of stockholders, § 16, p. 719.

Of directors shall be in such manner as may be prescribed by the by-laws of the corporation, § 16, p. 719.

In election of directors, each stockholder shall be entitled to one vote for each share of stock held by him, § 16, p. 719.

At election of directors, the books and papers of corporation shall be exhibited to the meeting, provided a majority of stockholders present require it, § 16, p. 719.

Vacancies in board of directors shall be filled as prescribed by by-laws, § 16, p. 719.

ELECTRIC WIRES.

Board may provide ways or galleries for, when necessary to permit proper construction of any railway under this act, § 6, pp. 709-711.

ELEVATED RAILROADS.

No portion of any street or avenue now actually occupied by any elevated railroad structure shall be occupied by any corporation organized under the provisions of this act, § 4, pp. 704-706.

ELEVATED RAILROADS — Continued:

Commissioners may locate routes across any street or avenue now occupied by any elevated railroad structure, § 4, pp. 704-706.

Construction of, by bridge company in place of bridge approach, § 38a, pp. 746, 747.

ELEVATORS.

Board may locate and make specifications for, on rapid transit railways, § 6, pp. 709-711.

ELIGIBILITY.

Of commissioner of rapid transit, any person appointed by mayor shall be citizen of the United States, New York State, and a *bona fide* resident of city, § 1, pp. 703, 704.

EMPLOYEES.

The board may hire such, as it may deem necessary, § 9, p. 714.

Rapid transit corporation liable for debts of its contractor to his employees, § 22, p. 721.

Of rapid transit railways to wear badges, § 25, p. 723.

Intoxication of, while acting as engineer or conductor a misdemeanor, § 29, p. 724.

ENGINE.

Owner of, entitled to treble damages for wilful injury or stoppage of, § 30, pp. 724, 725.

Wilful stoppage of, or injury to, a misdemeanor, § 30, pp. 724, 725.

ENGINEERS.

Board may employ such, as it may deem necessary, § 9, p. 714.

Of rapid transit railway, shall wear badges, § 25, p. 723.

Intoxication of, while in charge of engine constitutes misdemeanor, § 29, p. 724.

ENTER.

Board may, upon private lands, to make maps and surveys, § 40, p. 749.

EQUIPMENT.

Board may contract for, of rapid transit railways, § 34a, pp. 735-739.

Board may provide, for rapid transit railway, § 34b, pp. 739, 740.

What shall include, for rapid transit railway, § 35, p. 743.

EQUITABLE CONTRIBUTION.

Between stockholders one or more of whom have had to pay labor debts of corporation, § 18, pp. 719, 720.

ESTIMATE AND APPORTIONMENT, BOARD OF.

Shall, for purposes of this act, be deemed the local authority in control of streets, roads, bridges, viaducts, wharves, etc., only its consent and that of mayor required, § 5, pp. 706-708.

Routes and plans of construction drawn by rapid transit commissioners shall be submitted to, § 5, pp. 706-708.

Shall begin to consider plans submitted by rapid transit commissioners within ten days after receipt thereof, § 5, pp. 706-708.

Shall take yea and nay vote on approving plans submitted by rapid transit commissioners, within sixty days after receipt thereof, § 5, pp. 706-708.

Shall, upon requisition of board of rapid transit commissioners, appropriate such sums of money as may be necessary to enable it to perform its duties, § 10, pp. 714-716.

Proceedings in case it refuses to grant requisition of rapid transit commissioners, § 10, pp. 714-716.

Approval of, requisite to franchises for tunnel railroad, § 32, pp. 725-728.

Approval of, requisite for plans of construction and terms for extensions of trunk line railroads within city, § 32, pp. 725-728.

Approval of, requisite to extension of trunk line railroad to terminals within city, § 32, pp. 725-728.

Shall direct comptroller to issue bonds for construction and equipment of railways at public expense, § 37, pp. 744, 745.

EXCAVATIONS.

Lawful to make necessary, § 24, subd. 5, pp. 722, 723.

Surface of streets shall be restored to former condition, after, § 24, subd. 5, pp. 722, 723.

Local authorities shall supervise restoration of streets after, § 24, subd. 5, pp. 722, 723.

EXEMPTION.

Rapid transit railways not to be taxed while in process of construction, § 15, p. 719.

EXHIBITION OF BOOKS.

Majority of stockholders present to elect directors may require, § 16, p. 719.

EXPENSES.

Of board of rapid transit railroad commissioners, see "BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS."

When amounts paid to city by successful bidders for franchises shall be repaid by corporation, § 13, pp. 717, 718.

EXTENSIONS.

Board may authorize, of lines of railroad corporations, § 32, pp. 725-728.

EXTENSIONS — Continued:

Tunnel railroad or trunk line extensions, consent of owners of one-half in value of property bounded on, must be obtained, § 32, pp. 725-728.

Of trunk lines within city, board shall fix terms, routes and plans for, § 32, pp. 725-728.

FACILITIES.

Tunnel railroad may acquire necessary, § 32, pp. 725-728.

FARES.

Shall not exceed five cents per passenger northward or southward within city of New York, § 7, pp. 711-713.

Conductor who does not wear badge may not demand or receive, § 25, p. 723.

Passenger may be ejected for refusing to pay, § 27, p. 724.

Corporation shall transport passengers upon payment of, § 28, p. 724.

Contracts of board for operation of railways built at public expense may provide rates of, § 34a, pp. 735-739.

Shall be adjusted to avoid recourse to taxation, § 34d, pp. 742, 743.

Order of preference in reduction of, on railways built under this act, § 34d, pp. 742, 743.

On elevated railroads constructed in place of bridge approaches, § 38a, pp. 746, 747.

FORCE.

Servants of corporation shall use no unnecessary, in ejecting passenger who refuses to pay fare, § 27, p. 724.

FORFEIT.

Person wilfully damaging railway property or interfering with operation thereof shall pay treble damages as, § 30, pp. 724, 725.

FORFEITURE OF FRANCHISE.

See "FRANCHISES."

FORFEITURE OF SHARES.

See "CAPITAL STOCK;" "CORPORATION, RAPID TRANSIT RAILROAD."

FOUNDATIONS.

Power of rapid transit corporation to secure, for railway tracks, etc., § 24, subd. 5, pp. 722, 723.

Surface of streets around, shall be restored to former condition by rapid transit corporation, under supervision of city, § 24, subd. 5, pp. 724, 725.

FRANCHISES.

1. For rapid transit railways.
2. For tunnel railroads to terminals.
3. Of other railways.

FRANCHISES — Continued:**1. For rapid transit railways.**

Shall be disposed of, by board at public sale, § 7, pp. 711-713.

Notice and manner of sale, § 7, pp. 711-713.

Forfeiture of rights under, § 7, pp. 711-713.

Sale of, shall be for a definite term of years, § 7, pp. 711-713.

Resale of, after expiration of term, § 8, p. 713.

Successful bidders for, shall have preference in allotment of capital stock, § 11, p. 716.

When successful bidders for, shall be repaid by corporation, § 13, pp. 717, 718.

2. For tunnel railroads to terminals.

Board may grant, to connect with a trunk-line railroad across river, § 32, pp. 725-728.

Board may grant, for extensions of trunk line railroads to terminals within city, § 32, pp. 725-728.

Corporation receiving, shall pay rentals, § 32, pp. 725-728.

Board's certificate of grant shall be contract with corporation, § 32, pp. 725-728.

Board may grant, to existing railways, for terminal connections, § 32a, pp. 728-731.

Shall not be for longer than twenty-five years, § 32a, pp. 728-731.

Upon expiration of, lines, plant, and structure, except rolling stock, shall become property of city, § 32a, pp. 728-731.

Uses of streets, etc., shall revert to the city, § 32a, pp. 728-731.

3. Of other railways.

Board may buy or condemn necessary, to prevent interference with rapid transit railways, § 39, pp. 747-749.

Board may grant, to steam railway, to build subway and lay additional tracks therein, L. 1906, ch. 109, § 2, pp. 764, 765.

Of steam railway operated at grade on streets, when board may condemn, L. 1906, ch. 109, § 4, pp. 767, 768.

Procedure for condemnation of, L. 1906, ch. 109, § 4, pp. 767, 768.

FREIGHT.

See also "PROPERTY."

Tunnel railroad may transport, § 32, pp. 725-728.

FREIGHT CHARGE.

See FARES."

FREIGHT TRAINS.

May be run on tunnel or connecting railroad, § 32, pp. 725-728.

FUNDS.

Board shall make requisition upon the board of estimate and apportionment for such sums as may be necessary to enable it properly to perform its duties, § 10, pp. 714-716.

City not liable for expenditures of board in excess of appropriations duly made by board of estimate and apportionment, or by supreme court, § 10, pp. 714-716.

GALLERIES.

Constructed by board to contain sewers, gas pipes, and other sub-surface structures, shall be under care and charge of board, § 6, pp. 709-711.

Revenue from those built by the board shall be paid into the treasury of city, § 6, pp. 709-711.

Board may construct, for pipes along subway built by steam railroad now at grade, L. 1906, ch. 109, § 3, pp. 765-767.

Use and rental of, built by board in subway of steam railway, L. 1906, ch. 109, § 3, pp. 765-767.

GAS PIPES.

Board may provide galleries or tunnels for, when necessary to permit the proper construction of a railway under this act, § 6, pp. 709-711.

GOVERNOR.

May appoint commissioners to fix rates for carrying mail, § 26, pp. 723, 724.

GRADE.

Board may authorize tunnel railway to improve or straighten, § 32, pp. 725-728.

Board shall prepare plan and remove steam locomotive railways from streets and public places at, L. 1906, ch. 109, § 1, p. 764.

GRADE CROSSINGS.

This act shall not authorize, § 24, subd. 5, pp. 722, 723.

GRANTS.

See "FRANCHISES."

GRANTS, VOLUNTARY.

Corporation may take and hold, of real estate and other property, § 24, subd. 1, p. 722.

Real estate received shall be used only for purposes of such grants, § 24, subd. 1, p. 722.

HARLEM RIVER.

Tunnel railroad under, board may grant franchise for, § 32, pp. 725-728.

HEARING.

Board shall hold, before letting contract for railways at public expense, § 37, pp. 744, 745.

HIGHWAYS.

See "STREETS."

HORSE POWER.

Rapid transit corporation may not use, on its railways, § 24, subd. 4, p. 722.

HORSE RAILWAYS.

Temporary use of tracks of, by rapid transit corporation or contractor not authorized, § 33, pp. 731-733.

HUDSON RIVER.

Tunnel railroad under, board may grant franchise for, § 32, pp. 725-728.

IMPAIRING.

Of railway property or work thereon, a misdemeanor, § 30, pp. 724, 725.

IMPLIED POWERS.

Board shall have and exercise such, as may be requisite to the efficient performance of the duties imposed upon said board by this Act, § 1, pp. 703, 704.

INCREASE IN CAPITAL STOCK.

See "CAPITAL STOCK."

INDEBTEDNESS.

See "BONDS."

INDIAN LANDS.

Act authorizing construction of railroads upon, not repealed, § 24, subd. 2, p. 722.

INFANT.

Payment of award of commissioners of appraisal to, § 49, p. 754.

INFORMALITY.

See "DEFECT."

INJURY.

Wilful, to railway property, a misdemeanor, § 30, pp. 724, 725.

INQUEST.

Board shall hold such inquest and investigation as may be deemed necessary to determine whether a rapid transit railway would be for the interest of the public and of the city, § 4, pp. 704-706.

INSPECTORS OF ELECTION.

Board shall appoint for first meeting of subscribers to capital stock of corporation, § 12, p. 717.

By-laws of corporation shall provide manner of electing or appointing, § 12, subd. 7, p. 717.

INTEREST.

Sums repaid by corporation to successful bidders for franchises shall bear interest to date of such repayment, § 13, pp. 717, 718.

INTERFERE.

Employee of rapid transit railway without badge may not interfere with passenger or his property, § 25, p. 723.

INTERSECT.

Power of rapid transit railway to, any other railway, § 24, subd. 3, p. 722.

INTERSECTIONS.

Corporation whose railway is intersected shall unite with owners of new railway in forming, § 24, subd. 3, p. 722.

Court shall fix compensation for, if corporations cannot agree, § 24, subd. 3, p. 722.

INTERSTATE COMMERCE.

Tunnel railroad to terminals, when may be built by railroad engaged in, § 32, pp. 725-728.

INTOXICATION.

Of engineer or conductor of train a misdemeanor, § 29, p. 724.

JOIN.

Power of rapid transit railway to, with any other railway, § 24, subd. 3, p. 722.

JUNCTIONS.

See also "INTERSECTIONS."

Rapid transit railway shall transport passengers and property offered at, § 28, p. 724.

LABOR DEBTS.

Liability of stockholders for, § 18, pp. 719, 720.

How established against stockholders of rapid transit corporation, § 18, pp. 719, 720.

LABORERS.

See "EMPLOYEES."

LANDING PLACES.

Board shall locate and make specifications for, on rapid transit railways, § 6, pp. 709-711.

LANDS.

See also "PARKS;" "PROPERTY;" "PUBLIC PLACES;" "STREETS."

Rapid transit corporation may enter upon and underneath, § 24, subd. 5, pp. 722, 723.

Use of by rapid transit railway declared a public use, § 24, subd. 5, pp. 722, 723.

Board may authorize tunnel railroads under, § 32, pp. 725-728.

Private, right to emerge to surface upon, § 32, pp. 725-728.

Board may enter on, to make surveys, § 40, p. 749.

LATERAL SUPPORT.

Board may contract to give to grantor of property purchased, § 39, pp. 747-749.

LEASE.

Rapid transit corporation may lease necessary real estate and other property, § 24, subd. 2, p. 722.

LEGISLATURE.

May dissolve any corporation formed under this act, § 31, p. 725.

Dissolution of corporation by, does not impair remedies against corporation, § 31, p. 725.

LENGTHWISE.

Of streets, connecting railroads on surface may not run, § 32, pp. 725-728.

LIABILITY.

Dissolution by legislature does not impair, of rapid transit corporation, § 31, p. 725.

LIABILITY OF STOCKHOLDERS.

See also, generally, "STOCKHOLDERS."

For debts of corporation for labor and personal services, § 18, pp. 719, 720.

Individually liable to creditors of corporation up to amount not paid in on capital stock, § 18, pp. 719, 720.

Persons holding stock in a fiduciary capacity or for collateral security not personally liable, § 21, pp. 720, 721.

LICENSES.

See "FRANCHISES."

LIEN.

On rolling stock of railways built at public expense, city may have first, § 34a, pp. 735-739.

LIMITATION.

Of time for presentation of claims for compensation to commissioners of appraisal, § 55, pp. 756, 757.

LOCAL AUTHORITIES.

May request board to determine necessity of new railways, § 4, pp. 704-706.

Board of estimate and apportionment and mayor are, for giving of consents, § 5, pp. 706-708.

Board of estimate and apportionment shall control all franchises, § 5, pp. 706-708.

Shall supervise restoration of streets after excavation, § 24, subd. 5, pp. 722, 723.

Mode of giving consent for tunnel railroad or trunk-line extensions, § 32, pp. 725-728; § 34, pp. 733-735.

Consent of, to construction of elevated railroad in place of bridge approaches, § 38a, pp. 746, 747.

MACHINE.

Railway owning, entitled to treble damages for wilful injury or obstruction of, § 30, pp. 724, 725.

Wilful stoppage of or injury to, a machine of rapid transit railway, a misdemeanor, § 30, pp. 724, 725.

MAIL.

Rapid transit railway shall carry, when applied to by postmaster-general, § 26, pp. 723, 724.

Appointment of commission to determine rates and conditions of carrying, § 26, pp. 723, 724.

Price for carrying shall not be less than for freight, and fair compensation for post-office car, § 26, pp. 723, 724.

When corporation is entitled to extra pay for carrying, § 26, pp. 723, 724.

MAINTENANCE.

Power of rapid transit corporation respecting, of its railways, § 24, subd. 5, pp. 722, 723.

Board may provide and contract for, of railway built at public expense, § 34a, pp. 735-739.

MAPS.

In condemnation proceedings, of lands to be acquired by board shall be made in triplicate, § 40, p. 749.

In condemnation proceedings, board may enter on lands to make, § 40, p. 749.

In condemnation proceedings, first set shall be filed in department of public works, § 40, p. 749.

In condemnation proceedings, second set shall be filed with county clerk, § 42, p. 750.

Use of, by commissioners of appraisal in condemnation proceedings, § 48, pp. 753, 754.

In condemnation proceedings, third set shall be annexed to commissioner's report, § 49, p. 754.

MAYOR.

Shall be member of board of rapid transit commissioners, § 1, pp. 703, 704.

Shall fill vacancies in board arising after January 1, 1906, § 1, pp. 703, 704.

Need not take oath of office as commissioner of rapid transit, § 2, p. 704.

Is entitled to notice from commissioners of their application to supreme court to fix their compensation, § 10, pp. 714-716.

MEDDLE.

Employee without badge may not, with passenger or his property, § 25, p. 723.

MEETINGS OF BOARD.

Four members shall constitute a quorum for transaction of business, but fewer may adjourn meetings, § 3, p. 704.

Record of proceedings shall be kept, and shall be a public record, open to inspection at all reasonable times, § 3, p. 704.

MEETINGS OF STOCKHOLDERS.

Board shall call and give ten days' notice of, to organize corporation, § 11, p. 716.

Directors shall be chosen at first, § 12, p. 717.

By-laws must be adopted at first, § 12, p. 717.

Board shall appoint inspectors of election for first, § 12, p. 717.

By-laws shall fix term of office of directors elected at subsequent, § 12, subd. 1, p. 717.

By-laws of corporation shall provide time and place of annual, § 12, subd. 3, p. 717.

By-laws shall provide manner of calling and holding special, § 12, subd. 4, p. 717.

By-laws of corporation shall provide how many stockholders, present in person or by proxy, shall constitute a quorum at any, § 12, subd. 5, p. 717.

Record of proceedings at first, shall be filed with secretary of state and county clerk, § 13, pp. 717, 718.

Changes in detailed specifications after organization of corporation, can be approved only at special meeting called for that purpose, upon written notice to directors of nature of business, § 14, p. 718.

Majority of stockholders present at election of directors may require exhibition of books and papers, § 16, p. 719.

To vote on increase or reduction of capital stock, requirements for, § 20, p. 720.

MISDEMEANOR.

Intoxication of engineer or conductor on train is, § 29, p. 724.

Wilful injury to railway property or obstruction of work thereon is, § 30, pp. 724, 725.

MIXED TRAINS.

May be run on tunnel railroad, § 32, pp. 725-728.

MODIFICATION OF PLANS.

See "ALTERATION OF PLANS;" "PLANS."

MODIFICATIONS, CERTIFICATE OF.

Board shall approve and attest, § 14, p. 718.

Must be filed with secretary of state and duplicate filed with county clerk, § 14, p. 718.

Contents of, § 14, p. 718.

MONEY.

Rapid transit corporation may borrow, § 24, subd. 6, p. 723.

Spent in acquiring property under this act, how raised and paid, § 61, p. 759.

MUNICIPAL CONSTRUCTION.

Vote of the people for, § 34, pp. 733-735; L. 1894, ch. 752, § 12, pp. 762, 763.

MUNICIPALITY.

See "CITY."

NEGLECT.

By railway to transport traffic makes it liable in damages to party aggrieved, § 28, p. 724.

NEWSPAPERS.

Board may permit sale of on railways, § 34a, pp. 735-739.

NON COMPOS MENTIS.

See "UNSOUND MIND."

NORTH RIVER.

Board may grant franchises for tunnel railroad under, § 32, pp. 725-728.

NOTICE.

See also "PUBLIC NOTICE."

Two weeks' notice shall be given of application to appellate division to determine whether a rapid transit railway shall be built, § 5, pp. 706-708.

Of time and place of sale of franchises must be published for six weeks, § 7, pp. 711-713.

Board shall give notice to mayor of application to supreme court to fix compensation, § 10, pp. 714-716.

Board shall give public notice of opening of subscription books for capital stock, § 11, p. 716.

Ten days' notice shall be given to each subscriber of meeting to organize rapid transit corporation, § 11, p. 716.

NOTICE — Continued:

Written notice stating nature of business to be transacted must be given to directors, of meetings at which it is proposed to approve changes in specifications in articles, § 14, p. 718.

Laborer or servant must give stockholder written notice of intent to hold him liable for corporate debt, § 18, pp. 719, 720.

In writing shall be given to each stockholder of meeting to increase or reduce capital stock, § 20, p. 720.

What required to make corporation liable for debts of its contractor to his employees, § 22, p. 721.

Regular times for cars shall be fixed by public notice, § 28, p. 724.

Board shall give, for proposals for railway construction, operation, etc., § 36, pp. 743, 744.

Of hearing on proposed contracts to build railroads at public expense, § 37, pp. 744, 745.

Of application for appointment of commissioners of appraisal in condemnation proceedings, § 44, p. 751.

OATH OF OFFICE.

Oath which commissioners must take, § 2, p. 704.

Where filed, § 2, p. 704.

Mayor and comptroller need not take, § 2, p. 704.

OATHS.

Commissioners of appraisal may administer, § 48, pp. 753, 754.

OBSTRUCTION.

Of railway property or work thereon, a misdemeanor, § 30, pp. 724, 725.

OFFICERS.**1. Of rapid transit corporation.**

Shall include president, secretary and treasurer, § 12, subd. 6, p. 717.

By-laws shall provide powers and duties of, § 12, subd. 6, p. 717.

By-laws shall provide manner of electing, § 12, subd. 6, p. 717.

2. Of rapid transit railway.

Who do not wear badge may not interfere with passenger or his property, § 25, p. 723.

OFFICES.

Board may rent such offices as it may deem necessary, § 9, p. 714.

Principal offices of rapid transit corporation shall be in cities where railways are located, § 15, p. 719.

OPENINGS.

Lawful for rapid transit railway to make necessary, along route, § 24, subd. 5, pp. 722, 723.

OPERATE.

Power of corporation to operate railways, § 24, subd. 5, pp. 722, 723.

Rapid transit corporation may borrow money to operate its railways, § 24, subd. 6, p. 723.

When board may operate railway built at public expense, § 34a, pp. 735-739.

OPERATION.

Board may provide and contract for, of railways built at public expense, § 34a, pp. 735-739.

Rentals to be paid to city under contract for, of railways built at public expense, § 34a, pp. 735-739.

Board may equip railway built at public expense and contract for, § 34b, pp. 739, 740.

Contents of bonds and contract for, of railway built at public expense, § 34c, pp. 740-742.

ORGANIZATION.

Of board, § 3, p. 704.

Of rapid transit corporation, § 11, p. 716.

ORGANIZATION, CERTIFICATE OF.

See "CERTIFICATE OF ORGANIZATION."

PARKS.

Shall not be occupied under this Act, § 4, pp. 704-706.

Commissioners may locate routes by tunnel under any, § 4, pp. 704-706.

No corporation shall have right to acquire use and occupancy of, § 24, subd. 5, pp. 722, 723.

Proper authorities may grant temporary privileges in, to facilitate construction, § 24, subd. 5, pp. 722, 723.

Shall not be occupied or crossed by elevated railroads constructed in place of bridge approaches, § 38a, pp. 746, 747.

Board shall prepare plan to remove steam locomotive railways from, at grade, L. 1906, ch. 109, § 1, p. 764.

PARKWAYS.

Connecting railroads may run over and across but not over and lengthwise of, § 32, pp. 725-728.

Board may authorize tunnel railroads under, § 32, pp. 725-728.

PAR VALUE.

As basis for organization tax on stock of corporation, § 13, pp. 717, 718.

PASSENGERS.

Corporation may receive compensation for conveying, § 24, subd. 4, p. 722.

Officer of corporation not wearing badge may not interfere with, § 25, p. 723.

May be ejected for refusing to pay fare, § 27, p. 724.

Cars to transport, shall be run at regular times, § 28, p. 724.

Sufficient accommodations shall be furnished to transport, § 28, p. 724.

Tunnel railroad shall form continuous line for carriage of, § 32, pp. 725-728.

Tunnel railroad may transport, § 32, pp. 725-728.

PASSENGER STATIONS.

Servants employed at, shall wear badges, § 25, p. 723.

PASSENGER TRAINS.

Persons employed on, shall wear badges, § 25, p. 723.

May be run on tunnel railroad, § 32, pp. 725-728.

PAYMENTS.

See also "CONDEMNATION PROCEEDINGS;" "FARES."

PAYMENTS FOR STOCK.

Directors shall require, § 17, p. 719.

Stock not transferable until all previous calls thereon have been fully paid in, § 19, p. 720.

PEOPLE, VOTE OF.

See "MUNICIPAL CONSTRUCTION;" "VOTE."

PERIODICALS.

See "NEWSPAPERS."

PERSONAL ESTATE.

Stock of corporations under this act shall be deemed, § 19, p. 720.

PERSONAL SERVICES.

Liability of stockholders for corporate debts for, § 18, pp. 719, 720.

PERSONS.

See "EMPLOYEES;" "OFFICERS;" "PASSENGERS."

PIERS.

Power of rapid transit corporation to erect, § 24, subd. 5, pp. 722, 723.

Surface of streets around, shall be restored to former condition, § 24, subd. 5, pp. 722, 723.

PIPE GALLERIES.

See "GALLERIES;" "PIPES."

PIPES.

May be temporarily removed during construction of railway, § 33, pp. 731-733.

Board may erect galleries for, in subway built by steam railway, L. 1906, ch. 109, § 3, pp. 765-767.

PLACES, PUBLIC.

See "PUBLIC PLACES."

PLANS OF CONSTRUCTION.

See also "ALTERATION OF PLANS."

Board may adopt plan for a rapid transit railway or railways, § 4, pp. 704-706.

Detailed plans must conform to general plan, § 6, pp. 709-711.

No alteration by board without consent of contractor and his sureties, § 6, pp. 709-711.

Must be made part of articles of association of rapid transit corporation, § 11, p. 716.

Board may authorize corporation to alter, in its articles, § 14, p. 718.

Modifications of, must be approved by two-thirds of directors at special meeting called for that purpose, § 14, p. 718.

Board shall fix and determine plans for extensions to terminals, § 32, pp. 725-728.

Powers of board to modify, after vote of people, § 34, pp. 733-735.

For construction of elevated railroad in lieu of bridge approaches, § 38a, pp. 746, 747.

PLATFORMS.

Board shall locate and make specifications for, § 6, pp. 709-711.

PLEADINGS.

Supreme court is authorized to amend, to correct defects in condemnation proceedings, § 59, p. 758.

POSTMASTER-GENERAL.

May apply to rapid transit railways to carry mail, § 26, pp. 723, 724.

POST-OFFICE CAR.

Corporation entitled to fair compensation for, § 26, pp. 723, 724.

POWER.

Corporation may use steam or any other motive power except animal power, § 24, subd. 4, p. 722.

POWERS.

See also "BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS;"
"COMMISSIONERS OF APPRAISAL;" "CORPORATION;" "DIRECTORS."

Board of rapid transit commissioners shall have and exercise the specific authority and powers conferred by the Act, and also such other and necessary powers as may be requisite to the efficient performance of the duties imposed by the Act, § 1, p. 703, 704.

Corporation may take and hold voluntary grants of real estate and other property, § 24, subd. 1, p. 722.

Real estate received by corporation by voluntary grant shall be used only for purposes of such grant, § 24, subd. 1, p. 722.

Corporation may purchase, lease, hold and use all real estate and other property necessary to accomplish objects of its incorporation, § 24, subd. 1, p. 722.

Corporation may cross, intersect, join and unite its railways with those of any other, § 24, subd. 3, p. 722.

Corporation may take and convey persons and property for compensation, § 24, subd. 4, p. 722.

Corporation may enter upon and underneath streets and lands, and into and upon the soil thereof, § 24, subd. 5, pp. 722, 723.

Corporation may construct, maintain, operate and use railways, § 24, subd. 5, pp. 722, 723.

Corporation may secure necessary foundations to secure safety and stability of its railways, § 24, subd. 5, pp. 722, 723.

Corporation may erect columns, piers and other structures required to secure safety and stability of its railways, § 24, subd. 5, pp. 722, 723.

Corporation may borrow money to complete or operate road, § 24, subd. 6, p. 723.

Corporation may issue and dispose of bonds, § 24, subd. 6, p. 723.

POWERS AND DUTIES.

By-laws of corporation shall provide powers and duties of officers, § 12, subd. 6, p. 723.

POWERS OF OFFICE.

Conductor who does not wear badge may not exercise any of, § 25, p. 723.

PREFERENCES.

See "CAPITAL STOCK;" "FRANCHISES."

PREFERRED CAUSES.

Suits by or against board are preferred causes on civil calendars, § 9, p. 714.

PRESIDENT OF CORPORATION.

Officers of corporation shall include a, § 12, subd. 6, p. 717.

Shall sign statement of increase or reduction of capital stock, § 20, p. 720.

PRESIDING OFFICER.

Articles of association for rapid transit corporation must be indorsed with signature of presiding officer of board, § 11, p. 716.

PRINCIPAL OFFICES.

Of rapid transit corporation shall be in the city where its railway is located, § 15, p. 719.

PROCEEDINGS.

Board shall keep a public record of its proceedings, which shall be open to inspection at all reasonable times, § 3, p. 704.

Copy of record of, at first meeting of subscribers shall be filed, § 13, pp. 717, 718.

Of commissioners of appraisal, supreme court may correct defects in, § 59, p. 758.

PROPERTY.

Corporation may take and hold real estate and other property by voluntary grant, § 24, subd. 1, p. 722.

Corporation may purchase, lease, hold and use necessary real estate and other property, § 24, subd. 2, p. 722.

Power of corporation to convey, § 24, subd. 4, p. 722.

Corporation may receive compensation for conveying, § 24, subd. 4, p. 722.

Employee without badge may not interfere with, of passenger, § 25, p. 723.

Sufficient accommodations shall be furnished to transport, § 28, p. 724.

Cars to transport, shall be run at regular times, § 28, p. 724.

Wilful stoppage, or injury to, of railroad, a misdemeanor, § 30, pp. 724, 725.

Continuous line for carriage of, tunnel railroad shall form, § 32, pp. 725-728.

Special definition of, § 39, pp. 747-749.

Board may acquire, for necessary purposes, § 39, pp. 747-749.

Board may enter upon, to make maps and surveys of, § 40, p. 749.

When board may direct condemnation proceedings to acquire, § 41, p. 750.

When city becomes seized of, under condemnation proceedings, § 47, pp. 752, 753.

All acquired under this act shall be deemed to be for public use and to facilitate rapid transit, § 60, pp. 758, 759.

Moneys spent in acquiring necessary, how raised and paid, § 61, p. 759.

PROPERTY-OWNERS.

Consent of, shall be obtained along any proposed route, § 5, pp. 706-708.

Consents of owners of one-half in value of property adjoining proposed railroad must be obtained for tunnel railroad or trunk-line extensions, § 32, pp. 725-728.

Determination of supreme court commissioners in lieu of consent of, to trunk railroads or trunk line extensions, § 32, pp. 725-728.

Consents of, to construction of elevated railroad in place of bridge approach, § 38a, pp. 746, 747.

Determination of compensation to, by commissioners of appraisal, § 48, pp. 753, 754.

PROPOSALS.

Board shall advertise for, before awarding contracts, § 36, pp. 743, 744.

PROXIES.

By-laws of corporation shall provide how many stockholders shall be present in person or by proxy, to constitute a quorum at any stockholders' meeting, § 12, subd. 5, p. 717.

PUBLIC.

May inspect records of proceedings of board at any reasonable time, § 3, p. 704.

PUBLICATION.

See "NOTICE."

PUBLIC LANDS.

See also "LANDS."

Surface of, used by rapid transit railway shall be restored to former condition, § 24, subd. 5, pp. 722, 723.

PUBLIC NOTICE.

See "NOTICE."

PUBLIC PARKS.

See "PARKS."

PUBLIC PLACES.

Corporation may enter upon and underneath, § 24, subd. 5, pp. 722, 723.

Board may authorize tunnel railroad under, § 32, pp. 725-728.

Board shall prepare plan for removal of steam locomotive railway at grade from, L. 1906, ch. 109, § 1, p. 764.

PUBLIC PURPOSE.

See also "PUBLIC USE."

Acquiring of property needed by contractor in constructing or operating railway shall be deemed for, § 39, pp. 747-749.

PUBLIC SQUARES.

See "SQUARES, PUBLIC."

PUBLIC USE.

Use of streets and lands by railway declared to be, § 24, subd. 5, pp. 722, 723.

All property acquired by board under this act shall be deemed to be for, § 60, pp. 758, 759.

PUBLIC WORKS, COMMISSIONER OF.

Construction endangering sewers, water pipes and other sub-surface structures shall be conducted in accordance with reasonable requirements of, § 6, pp. 709-711.

May approve removal of pipes, sewers, conduits, etc., to another street, § 33, pp. 731-733.

PURCHASE.

Corporation may, necessary real estate, § 24, subd. 2, p. 722.

City may, at expiration of leases of railways built at public expense, § 34a, pp. 735-739.

QUALIFICATIONS.

See also "COMMISSIONERS OF APPRAISAL;" "SUPREME COURT COMMISSIONERS."

Any commissioner of rapid transit appointed by mayor shall be a citizen of United States and New York state and a *bona fide* resident of city, § 1, pp. 703, 704.

Director of rapid transit corporation shall be a holder in his own right of at least one hundred shares of the capital stock of the corporation, § 12, p. 717; § 16, p. 719.

Director of rapid transit corporation must be qualified to vote for directors at the meeting at which he shall be chosen, § 16, p. 719.

QUORUM.

Four members of board shall constitute quorum for transaction of business, but fewer may adjourn meetings, § 3, p. 704.

By-laws of corporation shall provide how many stockholders shall attend, in person or by proxy, to constitute a quorum at a stockholders' meeting, § 12, subd. 5, p. 717.

RAILROAD COMMISSIONERS, STATE BOARD OF.

This act shall not interfere with jurisdiction, powers and duties of, § 32, pp. 725-728.

RAILROAD CORPORATION.

See "CORPORATION, RAPID TRANSIT RAILROAD;" "DIRECTORS;" "RAILWAY, RAPID TRANSIT."

RAILROAD EMPLOYEES.

See "EMPLOYEES."

RAILROADS.

Act authorizing construction of, on Indian lands, not repealed by this act, § 24, subd. 2, p. 722.

RAILROAD, TUNNEL.

See "RAILWAY, RAPID TRANSIT."

RAILWAY, RAPID TRANSIT.

1. Constructed by private corporation.
2. Built at public expense.
3. Tunnel or connecting railways to trunk-line terminals.
4. Steam railways at grade.
5. Any built under this act.

1. Constructed by private corporation.

Board upon its own motion may, or upon the written request of the local authorities of the city shall, consider and determine whether a rapid transit railway would be for the interest of the public and of the city, § 4, pp. 704-706.

If board decides one is necessary, it shall establish the routes and general plan of construction thereof, § 4, pp. 704-706.

Where board may locate the routes of, § 4, pp. 704-706.

Votes of six commissioners necessary to establish routes and plan of construction for, § 4, pp. 704-706.

Plans shall be submitted to board of estimate and apportionment, for local authorities, § 5, pp. 706-708.

Obtaining of consents of property-owners along routes, § 5, pp. 706-708.

Judicial proceedings in lieu of property-owners' consents, § 5, pp. 706-708.

Preparation of detailed plans, § 6, pp. 709-711.

What detailed plans may include, § 6, pp. 709-711.

Alterations in plans, § 6, pp. 709-711.

Interference with sewers, gas pipes, etc., in work, § 6, pp. 709-711.

Rentals derived therefrom, § 6, pp. 709-711.

Subways for wires, sewers, etc., § 6, pp. 709-711.

Public sale of franchise for:

Notice of, § 7, pp. 711-713.

Terms of sale, § 7, pp. 711-713.

Forfeiture of bids and franchise, § 7, pp. 711-713.

Rates of fare fixed in franchise, § 7, pp. 711-713.

Power to reject bids, § 7, pp. 711-713.

Resale at expiration, § 8, p. 713.

Formation of rapid transit corporation, §§ 11-31, pp. 716-725.

Modification of plans for construction, § 14, p. 718.

RAILWAY, RAPID TRANSIT — Continued:**Constructed by private corporation — Continued:**

Certificate of modifications, § 14, p. 718.

Exemption from taxation during construction, § 15, p. 719.

Liability of stockholders for debts to employees, § 18, pp. 719, 720.

Liability of corporation to employees of contractors on railway, § 22, p. 721.

Powers of rapid transit corporation, § 23, p. 721; § 24, pp. 722, 723.

May acquire necessary real estate, § 23, p. 721.

May cross, intersect, join and unite other railways, § 24, subd. 3, p. 722.

May take and convey persons and property for compensation, § 24, subd. 4, p. 722.

May use steam or any other motive power except animal, § 24, subd. 4, p. 722.

May enter on and underneath streets, lands, etc., § 24, subd. 5, pp. 722, 723.

May not acquire and use public parks or squares, § 24, subd. 5, pp. 722, 723.

Nothing in this act shall authorize crossing of steam railway tracks at grade, § 24, subd. 5, pp. 722, 723.

May erect columns, piers, etc., to secure safety and stability, § 24, subd. 5, pp. 722, 723.

May make necessary excavations along route, § 24, subd. 5, pp. 722, 723.

After excavations by, streets shall be restored to former condition, under supervision of local authorities, § 24, subd. 5, pp. 722, 723.

Use of streets and lands by, declared a public use, § 24, subd. 5, pp. 722, 723.

Employees shall wear badges, § 25, p. 723.

Employee of, without badge, may not interfere with passenger or his property, § 25, p. 723.

Shall carry mails, § 26, pp. 723, 724.

Commissioners appointed by governor shall fix rates for carrying mail on, if parties cannot agree, § 26, pp. 723, 724.

When entitled to extra compensation for carrying mails, § 26, pp. 723, 724.

Passengers refusing to pay fare may be ejected, § 27, p. 724.

Shall furnish sufficient accommodations for persons and property, § 28, p. 724.

Shall start and run its cars at regular times, § 28, p. 724.

Intoxication of employees of, a misdemeanor, § 29, p. 724.

RAILWAY, RAPID TRANSIT — Continued:**Constructed by private corporation** — Continued:

Person wilfully injuring or obstructing property of, shall forfeit treble damages, § 30, pp. 724, 725.

Wilful injury to property of, a misdemeanor, § 30, pp. 724, 725.

Legislature may annul or dissolve any corporation formed under this act, § 31, p. 725.

Dissolution of corporation by legislature shall not impair remedies for liabilities of, § 31, p. 725.

Condemnation proceedings by, §§ 39-62, pp. 747-759.

See "BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS;"
"CONDEMNATION PROCEEDINGS."

2. Built at public expense.

Provision for vote of people on, construction of, L. 1894, ch. 752, § 12, pp. 762, 763; § 13, p. 763.

Procedure of board where vote is favorable, § 34, pp. 733-735.

May adopt new routes or modify old ones, § 34, pp. 733-735.

Board shall let contracts for construction of, § 34, pp. 733-735.

May contract for part or all of routes planned, § 34, pp. 733-735.

May contract for equipment along with construction, § 34, pp. 733-735.

Board may contract for maintenance, care and operation of, § 34a, pp. 735-739.

Contract for operation, etc., shall not exceed twenty years, § 34a, pp. 735-739.

Compensation to city under contract for operation, § 34a, pp. 735-739.

Sinking fund for bonds for, § 34a, pp. 735-739.

City has first lien on rolling stock of, § 34a, pp. 735-739.

Board may equip, and contract for operation of, § 34b, pp. 739, 740.

Contract and bond for private operation of, § 34c, pp. 740-742.

Board may operate as well as equip, § 34d, pp. 742, 743.

Fares on, shall be adjusted to pay expenses and all charges, without recourse to taxation, § 34d, pp. 742, 743.

Order of preferences in reduction of fares on, § 34d, pp. 742, 743.

No use of, for advertising purposes, § 34d, pp. 742, 743.

No trade or traffic permitted on, except sale of newspapers and periodicals, § 34d, pp. 742, 743.

Equipment of, what shall include, § 35, p. 743.

RAILWAY, RAPID TRANSIT — Continued:**Built at public expense — Continued:**

Bids for construction on, must be advertised for before letting contracts, § 36, pp. 743, 744.

Contracts to build, shall not be let without public hearing, § 37, pp. 744, 745.

City may issue bonds for construction and equipment of, § 37, pp. 744, 745.

Contracts to construct or operate, how modified, § 38, pp. 745, 746.

Powers of board to acquire real estate for, § 39, pp. 747-748. Shall remain absolute property of city, § 63, p. 760.

All contracts for construction of, must be approved as to form by corporation counsel, L. 1894, ch. 752, § 13, p. 763.

3. Tunnel or connecting railway to trunk-line terminals.

Board may grant franchise to corporation formed to build, § 32, pp. 725-728.

Board may grant franchises to trunk-line railroad to build, § 32, pp. 725-728.

Routes may proceed under rivers and under surface of Manhattan Island, § 32, pp. 725-728.

May acquire necessary sidings, facilities, etc., § 32, pp. 725-728.

Board may grant franchise to connecting railway, § 32, pp. 725-728.

Routes shall not run lengthwise of streets, § 32, pp. 725-728.

Franchise shall not be for more than twenty-five years, with renewal for not more than ten years, § 32, pp. 725-728.

Rental from franchises, § 32, pp. 725-728.

Certificate of contract, § 32, pp. 725-728.

Consent of owners of one-half in value of property bounded on, must be obtained, § 32, pp. 725-728.

Determination of supreme court commissioners in lieu of property-owners' consent, § 32, pp. 725-728.

Board may fix routes of connections of rapid transit railways with other railways, ferries, etc., § 32a, pp. 728-731.

Board may authorize laying of additional tracks for connections with terminals, § 32a, pp. 728-731.

Connecting railways:

May run passenger, freight or mixed trains, § 32a, pp. 728-731.

Shall pay rentals to city, § 32a, pp. 728-731.

Franchises shall not run more than twenty-five years, § 32a, pp. 728-731.

RAILWAY, RAPID TRANSIT — Continued:

Tunnel or connecting railways to trunk-line terminals — Continued:

Connecting railways — Continued:

Consent of property-owners or of supreme court in lieu thereof must be obtained, to construct, § 32a, pp. 728-731.

Rights of, in streets, and plant and structure of, shall become property of city on expiration of franchise, § 32a, pp. 728-731.

On expiration of franchise of, city may purchase rolling stock of, at fair valuation, § 32a, pp. 728-731.

Tracks of other railways may be removed temporarily during construction of, § 33, pp. 731-733.

Pipes, sewers, conduits and ways may be temporarily removed during construction of, § 33, pp. 731-733.

Damages for temporary removal of tracks of other railways, pipes, conduits, etc., shall be determined by commission, § 33, pp. 731-733.

Board may authorize erection of temporary tramways during construction of, § 33, pp. 731-733.

Use of tracks of horse railways by, during construction of, not authorized, § 33, pp. 731-733.

4. Steam railways at grade.

Board shall at once prepare plans to terminate use of streets and public places by, L. 1906, ch. 109, § 1, p. 764.

Board may contract with, for subway under present roadbed, L. 1906, ch. 109, § 2, pp. 764, 765.

Board may permit, to lay additional tracks in its subway, L. 1906, ch. 109, § 2, pp. 764, 765.

Board may construct pipe galleries, etc., along subway built by, L. 1906, ch. 109, § 3, pp. 765-767.

When board may condemn franchises of, L. 1906, ch. 109, § 4, pp. 767, 768.

Procedure in condemnation of franchises of, L. 1906, ch. 109, § 4, pp. 767, 768.

Plan for removal of, from streets does not apply to freight tracks not more than one-half mile in length, L. 1906, ch. 109, § 8, p. 770.

5. Any built under this act.

Shall not be taxed while in course of construction, § 15, p. 719.

Shall have its principal offices and be taxed on its property in city where its railways are located, § 15, p. 719.

Employees of, must wear badges, § 25, p. 723.

Conductor of, without badge, may not collect fares or tickets, § 25, p. 723.

RAILWAY, RAPID TRANSIT — Continued:**Any built under this act — Continued:**

Shall carry mails when applied to by postmaster-general, § 26, pp. 723, 724.

Servants of, may eject passenger refusing to pay fare, § 27, p. 724.

Shall furnish sufficient accommodations for the transportation of passengers and property, § 28, p. 724.

Shall be liable to the party aggrieved, for any neglect or refusal, § 28, p. 724.

Intoxication of engineer or conductor of train of, a misdemeanor, § 29, p. 724.

Wilful stoppage, or injury to property of, a misdemeanor, § 30, pp. 724, 725.

Fares on, shall be adjusted to meet all charges, without recourse to taxation, § 34d, pp. 742, 743.

In reduction of fares on, school-children shall be first favored, § 34d, pp. 742, 743.

In reduction of fares, all the public between 6 and 9 a. m. and 4 and 7 p. m. shall be next favored, § 34d, pp. 742, 743.

No part of any, shall be used for advertising purposes, § 34d, pp. 742, 743.

No trade or occupation shall be permitted on, except board may permit sale of newspapers, § 34d, pp. 742, 743.

All contracts for construction, etc., of, must be approved as to form by corporation counsel, L. 1894, ch. 752, § 13, p. 763.

Amendments of 1906 shall not affect railways then constructed, constructing or contracted for, L. 1906, ch. 472, § 14, p. 763.

RAPID TRANSIT.

All property acquired by board under this act shall be deemed to be to afford increased facilities for, § 60, pp. 758, 759.

RAPID TRANSIT ACT.

See "ACT."

RAPID TRANSIT RAILROAD COMMISSIONERS, BOARD OF.

See "BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS."

RAPID TRANSIT RAILROAD CORPORATION.

See "ARTICLES OF ASSOCIATION;" "CAPITAL STOCK;" "CORPORATION, RAPID TRANSIT RAILROAD;" "FRANCHISES;" "RAILWAY, RAPID TRANSIT."

RATES.

See also "FARES."

Contracts of board for operation of railways built at public expense may prescribe, § 34a, pp. 735-739.

REAL ESTATE.

Rapid transit corporation may acquire and hold, by purchase or condemnation, § 23, p. 721.

Rapid transit corporation may take and hold by voluntary grant, § 24, subd. 1, p. 722.

That taken by rapid transit corporation by voluntary grant shall be used only for purposes of such grant, § 24, subd. 1, p. 722.

Rapid transit corporation may purchase, lease, hold, and use necessary, § 24, subd. 2, p. 722.

Board may acquire for necessary purposes, § 39, pp. 747-749.

RECORD OF PROCEEDINGS.

Copy of, at first meeting of subscribers, shall be filed, § 13, pp. 717, 718.

RECOVERY.

Right of laborers and servants to recover from stockholders amounts due from corporation, § 18, pp. 719, 720.

Right of creditors of corporation to recover against stockholders, § 18, pp. 719, 720.

REDUCTION IN CAPITAL STOCK.

See "CAPITAL STOCK."

REFERENDUM TO PEOPLE.

Provision for, L. 1894, ch. 752, § 13, p. 763.

Duty of board if vote is favorable, L. 1894, ch. 752, § 13, p. 763.

REGULAR.

Cars shall be run at regular times, § 28, p. 724.

REMEDY.

Dissolution by legislature does not impair remedy for liabilities previously incurred, § 31, p. 725.

REMOVE.

Supreme court may remove an incapable or unfit commissioner of appraisal, § 59, p. 758.

RENEWALS.

Board may make, of franchises of railways built at public expense, § 34a, pp. 735-739.

RENTALS.

See "COMPENSATION."

REQUISITIONS.

Board shall make requisition upon the board of estimate and apportionment for such sums as may be necessary to enable it properly to perform its duties, § 10, pp. 714-716.

RESALE.

Franchises which expire shall be resold by board, § 8, p. 713.

Of franchises may be to old or new company, § 8, p. 713.

RESOLUTION.

By-laws of corporation must be approved by, of board, § 12, p. 717.

RESTORATION.

Local authorities shall supervise, of streets, etc., to former condition, after excavations by railway, § 24, subd. 5, pp. 722, 723.

REVENUE BONDS.

Comptroller is authorized to issue and sell revenue bonds to pay appropriations made under this act, § 10, pp. 714-716.

REVENUES.

From galleries and tunnels built by board to contain sewers, gas and water pipes and other subsurface structures, shall be paid into treasury of city, § 6, pp. 709-711.

RIVERS.

Board may authorize tunnel railroad under, § 32, pp. 725-728.

ROLLING STOCK.

- City may acquire, at fair valuation, upon expiration of franchises of tunnel or connecting railways, § 32a, pp. 728-731.
- City shall have first lien on, of railways built at public expense, § 34a, pp. 735-739.

ROUTES.

Votes of six rapid transit commissioners necessary to establish routes and plan of construction, § 4, pp. 704-706.

Board shall fix, for extensions of trunk lines within city, § 32, pp. 725-728.

Power of board to change, after vote of people, § 34, pp. 733-735.

Of elevated railroads constructed in place of bridge approaches, § 38a, pp. 746, 747.

SAFETY.

Board may in its detailed plans require devices to secure, § 6, pp. 709-711.

Corporation may erect structure to secure, § 24, subd. 5, pp. 722, 723.

SALARIES.

See also, "BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS;" "COMPENSATION."

Of rapid transit commissioners, how determined and paid, § 10, pp. 714-716.

Of commissioners of appraisals and their employees, § 62, p. 759.

SALE OF FRANCHISES.

See "FRANCHISES."

SEAL.

Board shall adopt, § 3, p. 704.

Articles of association for rapid transit corporation must be indorsed with, of board, § 11, p. 716.

SECRETARY.

Officers of corporation shall include a, § 12, subd. 6, p. 717.

SECRETARY OF STATE.

See also "BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS;" "CORPORATION;" "RAILWAY, RAPID TRANSIT."

Articles of association must be filed in office of, § 11, p. 716.

Certificate of organization and record of proceedings of first meeting of subscribers shall be filed in office of, § 13, pp. 717, 718.

Statement of increase or reduction in capital stock shall be filed with, § 20, p. 720.

SERVANT.

Of railway corporation on passenger train or at passenger station shall wear badge, § 25, p. 723.

Of railway corporation without badge may not interfere with passenger or his property, § 25, p. 723.

Of railway corporation, may eject passenger refusing to pay fare, § 27, p. 724.

SEWERS.

Expense of readjusting and supporting, shall be borne by company having franchise for railway, § 6, pp. 709-711.

Board may make provision for ways or tunnels for, where necessary, in order to permit of proper construction of any railway under this act, § 6, pp. 709-711.

May be temporarily removed during construction of rapid transit railway, § 33, pp. 731-733.

SCHOOL CHILDREN.

Entitled to first preference in reduction of fares, on railways built at public expense, § 34d, pp. 742, 743.

SHARES.

See also "CAPITAL STOCK."

By-laws may provide for forfeiture of, for non-payment of calls, § 12, p. 717.

SIDINGS.

Board shall locate and make specifications for, on rapid transit railway, § 6, pp. 709-711.

Railway may provide, in furtherance of its connections, etc., § 24, subd. 3, p. 722.

SIGNALS.

See "TELEGRAPH AND SIGNAL DEVICES."

SINKING FUND.

See "BONDS."

SPECIAL MEETINGS.

By-laws shall provide manner of calling and holding, of stockholders, § 12, subd. 4, p. 717.

SOIL.

Corporation may enter into and upon, § 24, subd. 5, pp. 722, 723.

SQUARES, PUBLIC.

See also "LANDS;" "STREETS."

No corporation shall have right to acquire use and occupancy of, § 24, subd. 5, pp. 722, 723.

Proper authorities may grant temporary privileges in, to facilitate construction, § 24, subd. 5, pp. 722, 723.

STABILITY.

Rapid transit corporation may erect structures to secure, § 24, subd. 5, pp. 722, 723.

STAIRWAYS.

Board shall locate and make specifications for, on rapid transit railway, § 6, pp. 709-711.

STATE.

See also "LEGISLATURE."

Legislature of, may annul or dissolve any corporation formed under this act, § 30, pp. 724, 725.

Not liable for injuries to persons or property in connection with any railroad under this act, § 32, pp. 725-728.

Not liable for acts or omissions of board, § 32, pp. 725-728.

STATE BOARD OF RAILROAD COMMISSIONERS.

See "RAILROAD COMMISSIONERS, BOARD OF."

STATIONS.

Board shall locate and make specifications for, on rapid transit railways, § 6, pp. 709-711.

Board may acquire necessary real estate for, on rapid transit railways, § 39, pp. 747-749.

STEAM LOCOMOTIVE POWER.

See also "RAILWAY, RAPID TRANSIT."

Rapid transit railway may use, § 24, subd. 4, p. 722.

This act shall not authorize crossing tracks of railway using, at grade, § 24, subd. 5, pp. 722, 723.

Board shall prepare plan of removal of tracks of railroad operated by, from streets and public places at grade, L. 1906, ch. 109, § 1, p. 764.

STENOGRAPHERS.

Commissioners of appraisal may appoint, § 62, p. 759.

STOCKHOLDERS.

See also "CAPITAL STOCK;" "ELECTIONS;" "MEETINGS."

Holders of one hundred shares are eligible for election as directors, § 12, p. 717; § 16, p. 719.

Each share of stock shall entitle holder to one vote for each director, § 12, p. 717.

By-laws shall provide time and place of annual meeting of, § 12, subd. 3, p. 717.

By-laws shall provide manner of calling and holding special meeting of, § 12, subd. 4, p. 717.

By-laws shall provide how many, present in person or by proxy, shall constitute quorum at any stockholders' meeting, § 12, subd. 5, p. 717.

Majority vote of, shall elect directors, § 16, p. 719.

In election of directors, each stockholder shall be entitled to one vote for each share of stock held by him, § 16, p. 719.

Majority present at meeting for election of directors may require exhibition of books and papers of corporation, § 16, p. 719.

When liable for debts of corporation to laborers and servants, § 18, pp. 719, 720.

Not personally liable for corporate debts to its contractors, § 18, pp. 719, 720.

May recover from other stockholders in ratable proportion for labor debts of corporation which he has had to pay, § 18, pp. 719, 720.

Individually liable to creditors to amount unpaid on capital stock held by each, § 18, pp. 719, 720.

Entitled to written notice of meeting to vote on increase or reduction of capital stock, § 20, p. 720.

Two-thirds of, must approve increase or reduction of capital stock, § 20, p. 720.

Persons holding in fiduciary capacity or for collateral security not personally liable, § 21, pp. 720, 721.

STOCKS.

See "CAPITAL STOCK."

STOPPAGE.

Of work on railway property a misdemeanor, § 30, pp. 724, 725.

STOPPING PLACES.

Passenger refusing to pay fare may be ejected at usual, § 27, p. 724.

Established for receiving and discharging way passengers and freight, § 28, p. 724.

Corporation shall transport passengers and property offered at, § 28, p. 724.

STREETS.

Specified streets not to be used or occupied by any corporation organized under this act, § 4, pp. 704-706.

Plans of construction adopted by board must show any encroachments upon, § 4, pp. 704-706.

Corporation may enter upon and under, § 24, subd. 5, pp. 722, 723.

Use of by railway declared a public use, § 24, subd. 5, pp. 722, 723.

Authorities may grant temporary privileges in, to facilitate construction, § 24, subd. 5, pp. 722, 723.

Surface of, to be restored to former condition, § 24, subd. 5, pp. 722, 723.

Board may authorize tunnel railroad under, § 32, pp. 725-728.

Connecting railroad may run over and across but not over and lengthwise, § 32, pp. 725-728.

Use of, by elevated railroads constructed in place of bridge approaches, § 38a, pp. 746, 747.

Board shall prepare to remove tracks of steam locomotive railways at grade from, L. 1906, ch. 109, § 1, p. 764.

STRUCTURES.

Power of corporation to erect those required to secure safety and stability in construction and maintenance of railways, § 24, subd. 5, pp. 722, 723.

Owner of, entitled to treble damages for wilful injury to, § 30, pp. 724, 725.

Of railway, wilful obstruction or injury of, a misdemeanor, § 30, pp. 724, 725.

SUBPOENAS.

Commissioners of appraisal may issue, § 48, pp. 753, 754.

SUBSCRIBERS.

See also "CAPITAL STOCK;" "CORPORATION, RAPID TRANSIT RAILROAD;" "STOCKHOLDERS."

Preference in allotment of capital stock shall be given to successful bidders for franchise, § 11, p. 716.

Board shall call meeting of subscribers to capital stock for organizing of corporation, § 11, p. 716.

Ten days notice by mail shall be given to each of, meeting to organize corporation, § 11, p. 716.

Shall adopt by-laws at first meeting, § 12, p. 717.

Shall elect directors at first meeting, § 12, p. 717.

Directors shall require payments on capital stock, § 17, p. 719.

SUBSCRIPTION BOOKS.

Shall be publicly opened for capital stock of rapid transit corporation, § 11, p. 716.

SUBSCRIPTION LIST.

Copy of, shall be filed, § 13, pp. 717, 718.

SUBWAYS.

Board may make provisions for ways, subways or tunnels for sewers, gas or water pipes or electric wires, § 6, pp. 709-711.

Board may contract with steam railway now operating at grade to build, L. 1906, ch. 109, § 2, pp. 764, 765.

SUFFICIENT.

Accommodations afforded by rapid transit railway shall be, § 28, p. 724.

SUITS.

Board may bring, in the name and in behalf of the city, § 9, p. 714.

Brought by or against board are preferred causes on civil calendars, § 9, p. 714.

SUPPORTS.

Board may locate and make specifications for, on rapid transit railways, § 6, pp. 709-711.

SUPREME COURT COMMISSIONERS.

See "COMMISSIONERS, SUPREME COURT," "RAILWAY, RAPID TRANSIT."

SURFACE.

Of streets shall be restored to former condition, § 24, subd. 5, pp. 722, 723.

Tunnel railroad may secure access to, § 32, pp. 725-728.

Right of rapid transit railway to emerge to, on private lands, § 32, pp. 722-728.

SURVEYORS.

Commissioners of appraisal may appoint necessary, § 62, p. 759.

SURVEYS.

Board may enter on private lands to make, § 40, p. 749.

SWITCHES.

Board shall locate and make specifications for, on rapid transit railways, § 6, pp. 709-711.

Railway may provide, in furtherance of connections, § 24, subd. 3, p. 722.

TAXES.

One-eighth of one per centum on par value of capital stock of corporation, § 13, pp. 717, 718.

Corporation shall pay, on its property in city where its railways are located, § 15, p. 719.

Railway not yet opened to traffic shall not be subject to, § 15, p. 719.
This act shall not affect liabilities of corporations to pay state or local, § 32, pp. 725-728.

Fares shall be such as to avoid recourse to, § 34d, pp. 742, 743.

On elevated railroads erected in place of bridge approaches, § 38a, pp. 746, 747.

TELEGRAPH AND SIGNAL DEVICES.

Board shall locate and make specifications for, on rapid transit railway, § 6, pp. 709-711.

TEMPORARY TRAMWAYS.

See "TRAMWAYS."

TERMINALS.

Of railroad, tunnel route authorized to connect with, § 32, pp. 725-728.

Board may authorize tunnel railroad to terminus within city, § 32, pp. 725-728.

TERMINUS.

See "TERMINALS."

TERM OF OFFICE.

Directors first elected shall hold office for one year or until successors are elected, § 12, p. 717.

That of directors shall be fixed by by-laws, not to exceed one year, § 12, subd. 1, p. 717.

TERMS OF SALE.

See also "CORPORATION, RAPID TRANSIT RAILROAD;" "FRANCHISES." Shall control powers of corporation to receive compensation for conveying persons and property, § 7, pp. 711-713.

TICKET.

Conductor who does not wear badge may not demand or receive, § 25, p. 723.

TRACKS.

See also "RAILWAY, RAPID TRANSIT."

Of other railways, may be temporarily removed during construction of rapid transit railway, § 33, pp. 731-733.

Board shall prepare plan for removal of, of steam locomotive railways, from streets and public places at grade, L. 1906, ch. 109, § 1, p. 764.

TRAINS.

See also "BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS," "RAILWAY, RAPID TRANSIT."

Passenger, freight or mixed trains may be run on tunnel or other terminal railroad, § 32, pp. 725-728.

TRAMWAYS.

Board may authorize use of temporary, in constructing rapid transit railway, § 33, pp. 731-733.

TRANSFERS OF STOCK.

See also "CAPITAL STOCK;" "CORPORATION, RAPID TRANSIT RAILROAD;" "STOCKHOLDERS."

May be made as prescribed by by-laws, § 19, p. 720.

May not take place till all previous calls thereon having been fully paid in, § 19, p. 720.

TRANSIT CORPORATION.

See "CORPORATION, RAPID TRANSIT RAILROAD."

TRANSPORTATION.

See "PASSENGERS;" "PROPERTY;" "RAILWAY, RAPID TRANSIT."

TREASURER.

Officers of rapid transit corporation shall include a, § 12, subd. 6, p. 717.

TREBLE.

Persons wilfully injuring or obstructing railway property shall pay treble damages, § 30, pp. 724, 725.

TRUNK LINE.

Connecting and terminal railroad to, franchises for, § 32, pp. 725-728.

TUNNEL RAILROAD.

See "RAILWAY, RAPID TRANSIT."

TUNNELS.

Commissioners may locate routes for tunnels under any public parks, lands, places, rivers or waters, § 32, pp. 725-728.

TURNOUTS.

Railway may provide, in furtherance of connections, § 24, subd. 3, p. 722.

VACANCIES.

Arising in offices held by persons specifically named in the act as commissioners, shall, after January 1, 1906, be filled by mayor of said city; before that date, by majority of remaining members of board, § 1, pp. 703, 704.

Manner of filling vacancies in any office or in board of directors of rapid transit corporation shall be provided in by-laws, § 12, subd. 2, p. 717.

In board of directors shall be filled according to by-laws, § 16, p. 719.

In position of commissioner of appraisal, how filled, § 48, pp. 753, 754; § 59, p. 758.

VOLUNTARY GRANTS.

See "GRANTS, VOLUNTARY."

VOTE.

In election of directors, each stockholder shall be entitled to one vote for each share of stock held by him, § 16, p. 719.

VOTE OF PEOPLE.

On construction of railways at public expense, provision for, L. 1894, ch. 752, § 12, pp. 762, 763.

On construction of railways at public expense, duty of board if vote is favorable, L. 1894, ch. 752, § 13, p. 763.

VOUCHERS.

Commissioners shall furnish comptroller with vouchers for their proper expenditures and compensation, § 10, pp. 714-716.

WATER PIPES.

Expenses of readjusting and supporting, must be borne by company having the franchise for railway, § 6, pp. 709-711.

Board may provide galleries or tunnels for, when necessary for the proper construction of any railway under this act, § 6, pp. 709-711.

WAY FREIGHT.

See also "FREIGHT;" "PROPERTY."

Rapid transit railway shall transport, § 28, p. 724.

WAY PASSENGERS.

See also "PASSENGERS."

Corporation shall transport, § 28, p. 724.

WEAKENING.

Railway buildings, machinery or other property, a misdemeanor, § 30, pp. 724, 725.

WILFUL.

Injury to, or interference with, railway property, a misdemeanor, § 30, pp. 724, 725.

WITNESSES.

Commissioner of appraisal may subpoena or swear, § 48, pp. 753, 754.

WORKS.

Wilful injury to, of rapid transit railway, a misdemeanor, § 30, pp. 724, 725.

Rapid transit railroad owning, entitled to treble damages for wilful injury to, § 30, pp. 724, 725.

APPENDIX B.

THE INTERSTATE COMMERCE ACT.

APPENDIX B.

THE INTERSTATE COMMERCE ACT.

Being an act of February 4, 1887, entitled "An act to regulate commerce" and acts amendatory thereof.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.**

Section 1. Application of Act—Interstate Commerce defined.—

That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

§ 1. Continued—Definitions—Common Carrier—Railroad Transportation.— The term "common carrier" as used in this Act shall in-

*The head notes of sections are not part of the statute as enacted.—Ed.

clude express companies and sleeping car companies. The term "railroad," as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

§ 1. Continued — Charges must be Reasonable.— All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

§ 1. Continued — Free Transportation, when Prohibited.—No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad, Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge and boards of managers of such homes; to necessary care takers of live stock, poultry, and fruit; to employees on sleeping cars, express cars and to linemen of telegraph and telephone companies; to railway mail service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision

shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof.

As amended by Act of April 13, 1908.

§ 1. Continued — Carriers not to deal in Commodities Transported.—From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

§ 1. Continued — Switches and Terminal Facilities.— Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without dis-

crimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

§ 2. Rebates Prohibited — Unjust Discrimination Defined.— That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

§ 3. Preferences and Advantages.— That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

§ 3. Continued — Duty of Connecting Lines.— Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

§ 4. Long and Short Haul Regulations — Power of Commission.— That it shall be unlawful for any common carrier subject to the pro-

visions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

§ 5. Pools and Combinations Prohibited.—That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

§ 6. Schedule of Rates to be Published.—That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate has been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or

office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

§ 6. Continued — Rates Through Foreign Country.—Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

§ 6. Continued — Change of Rates must be on Notice.—No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: Provided, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

§ 6. Continued — Provision as to joint tariff rates.—The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

§ 6. Continued — Publication Condition Precedent — Preference Time of War.—No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: Provided, That wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier."

That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic.

THE ELKINS ACT.

(Being the Act of February 19, 1903, as amended.)

§ 1. Elkins Act — Liability for Acts of Agents Receivers, Trustees, etc. — Imprisonment.—That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Act or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier

subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier, or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be

conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

§ 1. Elkins Act Continued — Rebates — Forfeiture of three times Amount, as Additional Penalty.— Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney-General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

§ 2. Elkins Act — Parties — Orders and Decrees.— That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

§ 3. **Elkins Act—Enforcement of Adherence to Rate.**— That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled An Act to regulate commerce and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: Provided, That the provisions of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second,

eighteen hundred and ninety, entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission.

§ 4. **Elkins Act—Repealer.**—That all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed, but such repeal shall not affect causes now pending nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this Act.

§ 5. **Elkins Act—Time of Taking Effect.**—That this Act shall take effect from its passage.

INTERSTATE COMMERCE ACT CONTINUED.

§ 7. **Continuous Carriage from Point of Shipment to Point of Destination.**—That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

§ 8. **Liability of Carrier in Damages.**—That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

§ 9. Remedy of Shipper in Alternative by Complaint to Commission or Suit in Federal Court.— That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

§ 10. Criminal Liability of Carrier.— That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

§ 10. Continued — Criminal Liability of Carrier for False Bills, Weights or Classification.— Any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and wilfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

§ 10. Continued — Criminal Liability of Shipper for False Bills, Weights or Classification.— Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

§ 10. Continued — Joint and Several Criminal Liability of Shipper and Carrier.— If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person, or such officer or agent of such corporation or company, shall be

deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

§ 11. Interstate Commerce Commission Created.— That a Commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five Commissioners,* who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years,† except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

§ 12. Commission may Prosecute through United States District Attorney.— That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the

*Term extended to seven years by § 24.

† Increased to seven by § 24.

Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

§ 12. Continued — Witnesses — Attendance Compulsory.—Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

§ 12. Continued — Penalty for Disobedience of Witness.—And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

§ 12. Continued — Testimony Taken by Deposition.—The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any

commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

§ 12. Continued — Deposition, how Taken.— Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

§ 12. Continued — Foreign Witnesses — Fees.— If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

§ 13. Complaint to Commission, How Made — Investigations, How Conducted.— That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged

to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

§ 13. Continued — Complaints by State Railroad Commissions.—

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

§ 14. Reports and Findings of Commission shall be Evidence.—

That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

§ 15. Commission May Fix Rates.—That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust

or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed.

§ 15. Continued — When Order of Commission takes Effect.—
Supplemental Order, Joint Rates.—All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, and when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line.

§ 15. Continued — Payment by Carrier for Services and Instrumentalities.—If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality

so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section.

The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act.

§ 16. Order for Damages, how Enforced — Findings of Commission Prima Facie Evidence.— That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

§ 16. Continued — Damage Claims to be Filed within Two Years.—All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: *Provided*, That claims accrued prior to the passage of this Act may be presented within one year.

§ 16. Continued — Damage Claims — Parties.— In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such

joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

§ 16. Continued — Order — How Served — Modification, or Suspension of.— Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be prima facie evidence of the receipt of such order by the carrier in due course of mail.

The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

§ 16. Continued — Orders how Enforced — Penalties and Forfeitures.— Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. The Commission may, with the consent of the Attorney-General, employ special counsel in any proceeding under this Act, paying the expenses of such employment out of its own appropriation.

§ 16. Continued — When Orders Enforced by Injunction.— If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to

the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus.

§ 16. Continued — Appeal, Venue — Provisions as to Court Review.—From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby, vested in such courts. The provisions of "An Act to expedite the hearing and determination of suits in equity, and so forth," approved February eleventh, nineteen hundred and three, shall be, and are hereby made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto. It shall be the duty

of the Attorney-General in every such case to file the certificate provided for in said expediting Act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes: *Provided*, That no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission. An appeal may be taken from any interlocutory order or degree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: *Provided further*, That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes.

§ 16. Continued — Schedule filed Prima Facie Evidence.—The copies of schedules and tariffs of rates, fares, and charges, and of all contracts, agreements, or arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual reports of carriers made to the Commission, as required by the provisions of this Act, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals.

§ 16a. Application for Re-hearing.—That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and

the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

§ 17. Procedure before Interstate Commerce Commission.—

That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas.

§ 18. Salary of Commission—Fees and Expenses.—That each Commissioner shall receive an annual salary of seven thousand five hundred dollars,* payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the commission.

* Increased to \$10,000 by § 24.

§ 19. Sessions of Commission, Where held.—That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act.

§ 20. Annual Reports — Contents — Uniformity.—That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freight, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the Commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual

reports within the time above specified, or within the time extended by the Commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the Commission it shall be subject to the forfeitures last above provided.

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

§ 20. Continued—Uniform Books and Accounts of Carriers, When Compulsory.—The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true,

and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

§ 20. Continued — Mandamus on Application of Commission or Attorney-General.— That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

§ 20. Continued — Bill of Lading Compulsory — Initial Carrier Liable for Damages.— That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad, or transportation company issuing

such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

§ 21. Commission to Make Annual Reports to Congress.—That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission.

§ 22. Free or Reduced Rates — Excursions — Mileage — Commutation Rates — Remedies Cumulative.—That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes.

Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this act.

Provided further, That nothing in this act shall prevent the issuance of joint interchangeable five-thousand mile tickets, with special privi-

leges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles.

But before any common carrier, subject to the provisions of this act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets, as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this act shall apply to any violation of the requirements of this proviso.

[§ 23.] Remedy by Mandamus to Move Traffic or Furnish Cars.—

That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or

interfere with other remedies provided by this act or the act to which it is a supplement.

[NOTE.—Section 23, as originally enacted, made appropriation for the Commission. This section is obsolete, and under its number we publish § 10 of the Act of March 2, 1889, c. 382, which, though not officially so numbered, has been regarded as, and was undoubtedly intended to be, section 23 of this Act.]

§ 24. When Act takes effect.— That the provisions of sections eleven and eighteen of this act, relating to the appointment and organization of the Commission herein provided for shall take effect immediately, and the remaining provisions of this act shall take effect sixty days after its passage.

[NOTE.—The foregoing are the provisions of section 24 as originally enacted. By the Act of June 29, 1906, c. 3591, § 8, a new section was added to the Act, to be numbered 24, which is printed below.—ED.]

[§ 24.] Commission Enlarged — Salaries — Term of Office.— That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the Commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Nor more than four Commissioners shall be appointed from the same political party.

§ 9. Act of June 29, 1906 — Application of Existing Laws.— That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to regulate commerce and all Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act.

§ 10. Act of June 29, 1906 — Repealer.— That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed,

but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

§ 11. Act of June 29, 1906—Act to Take Effect.—That this Act shall take effect, and be in force from and after its passage.

Resolution of June 30, 1906—Act in effect sixty days after Passage.—Section 11 of the Act of June 29, 1906, amending the Commerce Act, provided that the Act should take effect and be in force from and after its passage. This was superseded by the following joint resolution of June 30, 1906:

Resolved, etc., That the Act entitled "An act to amend an Act entitled 'An Act to regulate commerce,' approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," shall take effect and be in force sixty days after its approval by the President of the United States.

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Free transportation may be given to attorney in employ of carriers, and his family, § 1, pp. 837-840.

Person injured by violation of this Act may recover reasonable fee for an, from carrier, § 8, p. 847.

Any party may appear before commission by, § 17, p. 859.

ATTORNEY-GENERAL.

Prosecutions by commission shall be under direction of, § 12, pp. 850-852.

ATTORNEY-GENERAL — Continued:

Suits to recover forfeitures shall be under direction of, § 16, pp. 855-858.

Commission may employ special counsel with consent of, § 16, pp. 855-858.

Application by, at request of commission, for writ of mandamus, § 20, pp. 860-863.

Authorized to start civil action to collect forfeiture for receiving rebates, Elkins Act, § 1, pp. 843-845.

May direct district attorneys to prosecute proceedings against carriers, Elkins Act, § 3, pp. 846, 847.

ATTORNEYS' FEES.

In suits to enforce orders for payment of damages, § 16, pp. 855-858.

AWARD OF DAMAGES.

See, "DAMAGES;" "ORDER."

BAGGAGE.

Special privileges as to free, under mileage tickets, § 22, pp. 863, 864.

BAGGAGE AGENTS.

May receive free transportation, § 1, pp. 837-840.

BALANCE SHEET.

Annual report of carrier shall contain a, § 20, pp. 860-863.

BILLING.

Criminal liability of shipper for false, § 10, pp. 848-850.

Criminal liability of carrier for false, § 10, pp. 848-850.

BILL OF LADING.

Carrier shall issue, § 20, pp. 860-863.

Initial carrier liable to holder of, for damages to property, in transit, § 20, pp. 860-863.

Initial carrier may recover from carrier on whose lines property was injured, § 20, pp. 860-863.

Existing remedies at law preserved, § 20, pp. 860-863.

BOARDS OF MANAGERS.

Of Soldiers' and Sailors' Homes may be given free transportation, § 1, pp. 837-840.

BODY POLITIC.

Any, may complain to commission of violations by carrier, § 13, pp. 852, 853.

BOOKS AND PAPERS.

Court may compel production of, § 9, p. 848; Elkins Act, § 3, pp. 846, 847.

Power of commission to require production of, § 12, pp. 850-852.

BREAK OF BULK.

Shall not prevent continuous carriage, § 7, p. 847.

BRIDGES.

When included in term "railroad," § 1, pp. 837-840.

BULK.

Breaking of, shall not prevent continuous carriage, § 7, p. 847.

BUSINESS.

Commissioners shall not engage in any other, § 11, p. 850.

CALAMITY.

Carriers may give free transportation for relief in case of happening of, § 1, pp. 837-840.

CAPITAL STOCK.

Annual report of carrier shall show amount of its, § 20, pp. 860-863.

CARE-TAKERS.

When free transportation may be given to, § 1, pp. 837-840.

CARRIAGE.

Shall be continuous where practicable, § 7, p. 847.

CARRIER.

See also, "COMMON CARRIERS."

Wherever word occurs in this Act it shall be held to mean "common carrier," § 6, pp. 841-843.

CARRYING.

See, "COMMON CARRIERS;" "TRANSPORTATION."

CARS.

Included in term "transportation," § 1, pp. 837-840.

Duty of carrier to furnish, § 1, pp. 837-840.

Mandamus will lie to compel carrier to furnish, § 22, pp. 863, 864.

CASE.

Action on, by injured shipper, against carrier giving or shipper inducing unjust discriminations, § 10, pp. 848-850.

CAUSE OF ACTION.

For payment of damages; two years' limitation on, § 16, pp. 855-858.

CHAIRMAN OF COMMISSION.

Shall sign vouchers for its expenses, § 18, p. 859.

CHANGES.

In rates, etc., must be on thirty days' notice to commission and public, § 6, pp. 841-843.

In rates may be made on less than specified notice, when so authorized by commission, § 6, pp. 841-843.

CHARGES.

See also, "COMPENSATION;" "EARNINGS;" "FARES;" "FREIGHTS;" "PROCEEDS;" "RATES."

For transportation shall be just and reasonable, § 1, pp. 837-840.

Carriers shall not discriminate between connecting lines as to, § 3, p. 840.

For long and short hauls, § 4, pp. 840, 841.

Common carrier shall file, print and keep open to public inspection, schedules showing all, § 6, pp. 841-843.

Schedules filed and posted by carrier shall separately state all, § 6, pp. 841-843.

Schedules filed and posted by carrier shall separately state all icing charges, § 6, pp. 841-843.

Schedules filed and posted by carrier shall separately state all terminal charges, § 6, pp. 841-843.

Schedules filed and posted by carrier shall separately state all, which the commission may require, § 6, pp. 841-843.

Schedules filed and posted by carrier shall separately state any rules or regulations which affect the aggregate, § 6, pp. 841-843.

No change in, except on thirty days' notice to the commission and the public, § 6, pp. 841-843.

Carrier shall demand or receive only those specified in schedules, § 6, pp. 841-843.

Carrier shall not remit or refund any portion of, specified in schedules, § 6, pp. 841-843.

Power of commission to prescribe just and reasonable, § 15, pp. 853-855.

Supplemental order of commission as to division of joint, § 15, pp. 853-855.

Receiving of rebate or offset against the scheduled, Elkins Act, § 1, pp. 843-845.

Wilful failure to file, publish and strictly observe schedules of, a misdemeanor, Elkins Act, § 1, pp. 843-845.

Proceedings in court, instituted by commission to compel discontinuance of unlawful acts as to, Elkins Act, § 3, pp. 846, 847.

Orders of court directing discontinuance of discriminations or enforcing observance of tariffs, Elkins Act, § 3, pp. 846, 847.

CHARITABLE INSTITUTIONS.

Free transportation may be given to inmates of, § 1, pp. 837-840.

CHARITABLE PURPOSES.

This Act shall not prevent transportation at a reduced rate for, § 22, pp. 863, 864.

CHARITABLE SOCIETIES.

Agents of, when accompanying indigent or homeless persons, may be given free transportation, § 1, pp. 837-840.

CHARITABLE SOCIETIES — Continued:

Free transportation of homeless and destitute persons for, § 22, pp. 863, 864.

CHARITIES.

Persons engaged in, may be given free transportation, § 1, pp. 837-840.

CIRCUIT COURT.

See also, "COURTS."

Power of, to punish for contempt, persons refusing to testify before commission, § 12, pp. 850-852.

Jurisdiction in proceedings instituted by commission to compel discontinuance of unlawful proceedings as to rates, Elkins Act, § 3, pp. 846, 847.

CITY.

See, "BODY POLITIC."

CLAIMS FOR DAMAGES.

When must be filed, § 16, pp. 855-858.

CLASSIFICATION OF FREIGHT.

Schedules filed by carrier shall contain, in force, § 6, pp. 841-843.

Criminal liability of shipper for false, § 10, pp. 848-850.

Criminal liability of carrier for false, § 10, pp. 848-850.

CLERGYMEN.

See, "MINISTERS OF RELIGION."

COMBINATION.

Unlawful for common carrier to enter into, for pooling of freights or earnings, § 5, p. 841.

For pooling of freights, etc., each day of continuance is separate offense, § 5, p. 841.

To prevent continuous carriage, unlawful, § 7, p. 847.

COMMISSION.

1. General provisions.
2. Membership.
3. Organization and procedure.
4. Annual reports of commission.
5. Salary and expenses.
6. Filing of schedules with.
7. Supervision of accounts and reports of carriers.
8. Powers as to rates, service, etc.
9. Complaints and investigations.
10. Orders and awards, and service, enforcement and suspension thereof.
11. Rehearing on orders.
12. Court proceedings to enforce act.

COMMISSION — Continued:**1. General provisions.**

Created and established, § 11, p. 850.

Shall be known as the Interstate Commerce Commission, § 11, p. 850.

Is authorized and required to enforce provisions of this Act, § 12, pp. 850-852.

May employ special agents and examiners who may administer oaths, examine witnesses and receive evidence, § 20, pp. 860-863.

Application of existing laws to proceedings under amendment of 1906, Act of June 29, 1906, § 9, p. 865.

2. Membership.

Shall be appointed by the President, by and with the consent of the Senate, § 11, p. 850.

No person employed by, owning stock of, or financially interested in, a common carrier may be a member, § 11, p. 850.

Commissioners shall not engage in any other business or occupation, § 11, p. 850.

Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office, § 11, p. 850.

Filling of vacancies in, § 11, p. 855; § 24, p. 865.

Vacancy in, shall not impair power of other commissioners to act, § 11, p. 850.

Enlarged from five to seven members, § 24, p. 865.

Terms of office shall be seven years, § 24, p. 865.

No more than four shall be appointed from any political party, § 24, p. 865.

3. Organization and procedure.

Shall have a seal, which shall be judicially noticed, § 17, p. 859.

Proceedings shall be public on request of either party, § 17, p. 859.

Majority shall constitute a quorum, § 17, p. 859.

No commissioner shall participate in a hearing in which he has pecuniary interest, § 17, p. 859.

Every vote and official act shall be entered of record, § 17, p. 859.

Form of notices and service thereof shall conform as nearly as may be to those in use in courts of U. S., § 17, p. 859.

Any party may appear in person or by attorney, § 17, p. 859.

COMMISSION — Continued:**Organization and procedure** — Continued:

May conduct its proceedings in such manner as will best conduce to the proper dispatch of business and the ends of justice, § 17, p. 859.

Commission may make or amend general rules or orders for the regulation of proceedings before it, § 17, p. 859.

May hire suitable offices and procure necessary supplies, § 18, p. 859.

Shall appoint a secretary who shall receive \$3,500 per year, § 18 p. 859.

May hire and fix compensation of other employees, § 18, p. 859.

Any member may administer oaths and sign subpoenas, § 18, p. 859.

Principal office shall be in Washington, § 19, p. 860.

General sessions shall be held in Washington, § 19, p. 860.

Special sessions may be held in any part of United States, § 19, p. 860.

May prosecute inquiries, by one or more of its members, § 19, p. 860.

4. Annual reports of commission.

Shall make annual report to Congress, § 21, p. 863.

May print for early distribution its annual reports, § 14, p. 853.

5. Salary and expenses.

Expenses of prosecutions by, shall be paid out of appropriations for courts, § 12, pp. 850-852.

All expenses, including transportation of members and employees, shall be paid on presentation of itemized vouchers approved by chairman, § 18, p. 859.

Compensation of each commissioner shall be \$10,000 annually, § 24, p. 865.

6. Filing of schedules with.

Common carrier shall file schedules showing all its rates, fares, etc., § 6, pp. 841-843.

Form and contents, § 6, pp. 841-843.

Commission may prescribe and change form, etc., § 6, pp. 841-843.

Schedules shall separately state all charges which the commission may require, § 6, pp. 841-843.

No change shall be made in the rates, etc. except on thirty days' notice to public and commission, § 6, pp. 841-843.

Commission may allow changes in rates, etc. upon less notice, in special cases, § 6, pp. 841-843.

COMMISSION — Continued:**Filing of schedules with** — Continued:

Every common carrier shall file copies of all agreements, etc. relating to traffic, § 6, pp. 841-843.

Each party to joint tariff shall file evidence of concurrence therein, § 6, pp. 841-843.

Where no through route and joint rate have been established, § 6, pp. 841-843.

Schedules, contracts, annual reports, etc., filed with, shall be public records and prima facie evidence, § 16, pp. 841-843.

Filing of joint schedules on which joint interchangeable mileage tickets are based, § 22, pp. 863, 864.

Rate filed by carrier shall be conclusively deemed to be legal rate, Elkins Act, § 1, pp. 843-845.

7. Supervision of accounts and reports of carriers.

May prescribe uniform system of accounts, § 20, pp. 860-863.

May require carriers to give specific answers to questions, § 20, pp. 860-863.

May prescribe forms of accounts, records, etc., of carriers, § 20, pp. 860-863.

Shall have access to records, accounts, etc., of carriers, § 20, pp. 860-863.

May employ special agents to examine accounts, etc., of carriers, § 20, pp. 860-863.

Forfeiture for refusal to keep accounts in prescribed form, § 20, pp. 860-863.

False entry in books of carrier a misdemeanor, § 20, pp. 860-863.

Failure to make full and correct entries a misdemeanor, § 20, pp. 860-863.

Destroying or mutilating books or accounts of carrier a misdemeanor, § 20, pp. 860-863.

Examiner wrongfully divulging information, punishment of, § 20, pp. 860-863.

May require annual reports from carriers and prescribe form and contents of, § 20, pp. 860-863.

What annual report shall include, § 20, pp. 860-863.

Annual report to, shall be made under oath, § 20, pp. 860-863.

Forfeiture for failures to file annual report with, § 20, pp. 860-863.

Oath on annual report, before whom may be taken, § 20, pp. 860-863.

May extend time for filing of report, § 20, pp. 860-863.

May require monthly reports as to earnings, etc., § 20, pp. 860-863.

COMMISSION — Continued:**8. Powers as to rates, service, etc.**

Power to fix maximum rates, § 15, pp. 853-855.

Power to make fair and reasonable regulations, § 15, pp. 853-855.

May fix charges for services or instrumentalities furnished by shipper to carrier, § 15, pp. 853-855.

May establish through routes and joint rates, § 15, pp. 853-855.

Establishment of through route where one of connecting carriers is a water line, § 15, pp. 853-855.

Enumeration of powers in section 15 shall not exclude any power which commission would otherwise have had, § 15, pp. 853-855.

Power as to division of through rates, § 18, pp. 853-855.

9. Complaints and investigations.

Complaint by shipper upon failure of carrier to install switches, § 1, pp. 837-840.

Investigation upon failure of carrier to install switches, § 1, pp. 837-840.

Common carrier may apply for relief from long and short haul section of this Act, § 4, pp. 840, 841.

Shipper damaged must elect between complaint to commission and suit in federal court, § 9, p. 848.

Commission may inquire into management of business of all common carriers, § 12, pp. 850-852.

Commission may obtain from carriers full and complete information, § 12, pp. 850-852.

Commission may require attendance and testimony of witnesses and production of books, papers, etc., § 12, pp. 850-852.

Plea of incrimination shall not excuse witness from testifying, § 12, pp. 850-852.

Commission may invoke aid of courts if its subpoena is disobeyed, § 12, pp. 850-852.

Disobedience to subpoena of commission may be punished as a contempt of court, § 12, pp. 850-852.

Commission may order testimony taken by deposition, § 12, pp. 850-852.

Testimony by deposition, how taken, § 12, pp. 850-852.

Taking by deposition the testimony of a witness in a foreign country, § 12, pp. 850-852.

All depositions must be promptly filed, § 12, pp. 850-852.

Fees of witnesses testifying by deposition, § 12, pp. 850-852.

COMMISSION — Continued:**9. Complaints and investigations** — Continued:

Any person, corporation, society, etc., may complain to, of violations by carrier, § 13, pp. 852, 853.

Complaint to commission as to rates and service shall be by a petition, which shall briefly state the facts, § 13, pp. 852, 853.

Commission may investigate violations of Act complained of in petition or complaint, § 13, pp. 852, 853.

May investigate on its own motion, § 13, pp. 852, 853.

Means and manner of making investigations, § 12, pp. 852, 853.

No complaint shall be dismissed because of absence of direct damage to complainant, § 13, pp. 852, 853.

Commission shall forward charges to carrier, who shall satisfy complaint, or answer before commission, § 13, pp. 852, 853.

Commission shall make written reports of its investigations, § 14, p. 854.

Copy of report of investigation shall be furnished to carrier, § 14, p. 854.

All reports of investigations shall be entered of record and copies furnished the parties, § 14, p. 854.

Report of an investigation shall include its decision, order, etc., and findings of fact on which any award of damages is made, § 14, p. 854.

Commission may provide for publication of its reports of investigations, § 14, p. 854.

Authorized publication of its reports of investigations shall be competent evidence in courts, § 14, p. 854.

Complaints for recovery of damages must be filed with, within two years, § 16, pp. 855-858.

Exception as to claims accruing prior to passage of this Act, § 16, pp. 855-858.

Witnesses shall be paid same fees and mileage as in courts of U. S., § 18, p. 859.

All interested persons may be made parties, Elkins Act, § 2, p. 845.

10. Orders and awards, and service, enforcement and suspension thereof.

Order of, as to rates or practices, § 15, pp. 853-855.

When orders shall take effect and how long continue in force, § 15, pp. 853-855.

Supplemental order dividing joint rates among carriers, § 15, pp. 853-855.

Carrier shall comply with orders, § 16, pp. 855-858.

COMMISSION — Continued:**Orders and awards, etc.**— Continued:

Carrier or its representatives shall forfeit \$5,000 for each failure to obey orders, § 16, pp. 855-858.

Each distinct, and each day of, violation shall be separate offense, § 16, pp. 855-858.

Forfeitures recoverable in a civil suit, § 16, pp. 855-858.

Duty of United State district attorneys to sue to recover forfeitures, § 16, pp. 855-858.

Forfeitures payable into treasury of U. S., § 16, pp. 855-858.

May ask court to enforce its orders by injunction or mandamus, § 16, pp. 855-858.

May employ special counsel, paying expenses out of its own appropriation, § 16, pp. 855-858.

May modify or suspend its orders, § 16, pp. 855-858.

Orders shall be served by mail, § 16, pp. 855-858.

Registry mail receipt shall be prima facie evidence of receipt of order by carrier, § 16, pp. 855-858.

In suit to enforce order for a payment of damages, findings and order of, shall be prima facie evidence of facts, § 16, pp. 855-858.

Suit to enforce award of damages, where brought and proper parties, § 16, pp. 855-858.

Petition to enforce order for payment of damages must be filed within one year, § 16, pp. 855-858.

Appeal to Supreme Court on petition to enforce order, § 16, pp. 855-858.

Appeal from injunction lies only to Supreme Court, and must be taken within thirty days, § 16, pp. 855-858.

Venue of suits to suspend or enjoin orders of, § 16, pp. 855-858.

Expediting act applicable to suits to suspend or set aside orders of, § 16, pp. 855-858.

Orders and decrees may be made against additional parties to proceedings, Elkins Act, § 2, p. 845.

11. Rehearing on orders.

Commission may reverse or modify its original order at a, § 16a, pp. 858, 859.

May be granted on application of any party, § 16a, pp. 858, 859.

Application for, shall not excuse carrier from complying with order, § 16a, pp. 858, 859.

Application for, shall be governed by such rules as commission may establish, § 16a, pp. 858, 859.

Effect of order made at, § 16a, pp. 858, 859.

COMMISSION — Continued:**12. Court proceedings to enforce act.**

Any United States district attorney shall prosecute all necessary proceedings for, at its request, § 12, pp. 850-852.

Commission may employ special counsel, § 16, pp. 855-858.

May request attorney-general to apply for mandamus to enforce any provision of this Act, § 20, pp. 860-863.

Orders and decrees may be made against additional parties, Elkins Act, § 2, p. 846.

Power to institute court proceedings to compel discontinuance of unlawful acts as to rates, Elkins Act, § 3, pp. 846, 847.

Request by, that district attorneys prosecute proceedings against carriers, Elkins Act, § 3, pp. 846, 847.

COMMISSIONERS, INTERSTATE COMMERCE.

See, "COMMISSION."

COMMON CARRIERS.

Reports of, see, "REPORTS."

Books and accounts, see *post*, subheading 5. "Regulation by commission."

1. General provisions.
2. Powers, duties and liabilities.
3. Tariff schedules.
4. Under Elkins Act.
5. Regulation by commission.

1. General provisions.

" Scope of term, § 1, pp. 837-840.

Wherever word "carrier" occurs in this Act it shall mean common carrier, § 6, pp. 841-843.

2. Powers, duties and liabilities.

As to tariff schedules, see *post*, subheading 3. "Tariff schedules."

Liability of carriers under the Elkins Act, for wrongful acts, see *post*, subheading 4. "Under Elkins Act."

Duty to furnish transportation, § 1, pp. 837-840.

Duty to make reasonable and just rates and charges, § 1, pp. 837-840.

Duty to establish through routes and reasonable rates therefor, § 1, pp. 837-840.

Shall not discriminate as to rates and charges, § 2, p. 840.

Rebates unlawful, § 2, p. 840; Elkins Act, § 1, pp. 843-845.

Shall not give undue preference to any shipper, locality or kind of traffic, § 3, p. 840.

COMMON CARRIERS — Continued:**2. Powers, duties and liabilities** — Continued:

Shall charge only such rates, and grant only such privileges as are published in tariff schedules, § 6, pp. 841-843.

Departure from published rate unlawful, Elkins Act, § 1, pp. 843-845.

Shall afford facilities for interchange of traffic with connecting lines, § 3, p. 840.

Shall not discriminate between connecting lines as to rates and charges, § 3, p. 840.

Not required to give use of tracks or terminal facilities to connecting carrier, § 3, p. 840.

Compensation for long and short hauls, § 4, pp. 840, 841.

May apply to commission for relief from long and short haul section of this Act, § 4, pp. 840, 841.

Unlawful to enter pooling agreement or combination, § 5, p. 841.

Each day of agreement for pooling of freights, etc., is separate offense, § 5, p. 841.

Shall give precedence to, and expedite, military traffic, at demand of president of United States, § 6, pp. 841-843.

Shall not prevent continuous carriage, § 7, p. 847.

Carrier violating Act is liable in damages to persons injured, § 8, p. 847.

Shipper injured by violations by carrier must elect between complaint to commission and suit in federal court, § 9, p. 848.

Court may compel officer, agent, etc., of, to testify, § 9, p. 848.

Criminal liability for acts declared unlawful, § 10, pp. 848-850.

Fine may be imposed for violating Act, § 10, pp. 848-850.

Criminal liability for false billing, classification, etc., § 10, pp. 848-850.

Inducing or abetting carrier in unjustly discriminating, § 10, pp. 848-850.

Joint and several liability with shipper inducing unjust discrimination, § 10, pp. 848-850.

Failure to make entries, making false entries in books, and mutilation of records are misdemeanors, § 20, pp. 860, 863.

Shall issue bill of lading, § 20, pp. 860-863.

Initial carrier liable for damages to property in transit, § 20, pp. 860-863.

Initial, may recover from carrier on whose line property was damaged, § 20, pp. 860-863.

COMMON CARRIERS — Continued:**2. Powers, duties and liabilities — Continued:**

May not contract for exemption from liability for loss of, or injury to, property carried, § 20, pp. 860-863.

May issue mileage, excursion and commutation tickets, § 22, pp. 863, 864.

May issue joint interchangeable 5000-mile tickets, with special free baggage privileges, § 22, pp. 863, 864.

Shall file tariffs as basis for joint interchangeable mileage, § 22, pp. 863, 864.

May carry certain classes of property free or at reduced rates, § 22, pp. 863, 864.

May give free transportation only to enumerated persons, § 1, pp. 847-840; § 22, pp. 863, 864.

May carry its employees free, § 1, pp. 837-840; § 22, pp. 863, 864.

Who are "employees" of, within meaning of provision as to giving of free transportation, § 1, pp. 837-840.

Who included in term "families" as used in provision as to giving of free transportation, § 1, pp. 837-840.

Violation of provisions of Act as to giving of free transportation, a misdemeanor, § 1, pp. 837-840.

May exchange passes, § 22, pp. 863, 864.

May give reduced rates to enumerated classes of persons, § 22, pp. 863, 864.

Mandamus lies to compel, to furnish cars and move traffic, § 23, pp. 864, 865.

3. Tariff schedules.

See also, "SCHEDULES."

Carriers shall file with commission, print and keep open to public inspection, schedules showing all rates, fares, etc., § 6, pp. 841-843.

Failure to file, publish and observe schedules, an offense under Elkins Act, Elkins Act, § 1, pp. 843-845.

Carriers shall not engage in transportation of passengers or property unless the rates, etc., for same have been filed and posted, § 6, pp. 841-843.

Only rates and fares specified in schedules shall be charged, § 6, pp. 841-843.

Rates filed conclusively deemed legal rates, Elkins Act, § 1, pp. 843-845.

Carrier shall not refund or remit any portion of rates and charges specified in schedules, § 6, pp. 841-843.

Departure from rate filed by carrier deemed an offense under Elkins Act, Elkins Act, § 1, pp. 843-845.

COMMON CARRIERS — Continued:**3. Tariff schedules** — Continued:

Carrier shall not extend to any shipper or person any privileges or facilities not specified in tariffs, § 6, pp. 841-843.

Commission may prescribe and alter form of schedules, § 6, pp. 841-843.

Shall be plainly printed in large type, § 6, pp. 841-843.

Shall be kept posted in two public and conspicuous places in each station, etc., § 6, pp. 841-843.

Contents of, § 6, pp. 841-843.

Shall plainly state the places between which passengers and property will be transported, § 6, pp. 841-843.

Shall contain the classification of freight in force, § 6, pp. 841, 843.

Shall state separately all terminal charges, storage charges, etc., § 6, pp. 841-843.

Shall separately state any privileges or facilities granted or allowed, § 6, pp. 841-843.

Shall contain any rules or regulations which affect the aggregate rates, etc., or value of service rendered, § 6, pp. 841-843.

No change shall be made in rates, fares, etc., except on thirty days' notice to the commission and the public, § 6, pp. 841-843.

Commission may allow changes on less than specified notice in special cases, § 6, pp. 841-843.

Carrier shall file with commission copies of all its traffic agreements, etc., § 6, pp. 841-843.

The names of the several carriers parties to a joint tariff shall be specified therein, § 6, pp. 841-843.

Where no through route and joint rate has been established the several carriers shall file, print and keep open to public inspection schedules showing rates, etc., § 6, pp. 841-843.

Carriers receiving freight in United States to be carried through a foreign country to any place in the United States shall file, print and post schedules of through rates, § 6, pp. 841-843.

4. Under Elkins Act.

Unlawful to offer, grant or give rebate, etc., Elkins Act, § 1, pp. 843-845.

Jurisdiction of courts to punish rebating, etc., Elkins Act, § 1, pp. 843-845.

Rate filed with commission shall be conclusively deemed to be legal rate, Elkins Act, § 1, pp. 843-845.

COMMON CARRIERS — Continued:**4. Under Elkins Act** — Continued:

- Departure from rate filed by carrier shall be deemed an offense under Elkins Act, Elkins Act, § 1, pp. 843-845.
- Shipper accepting rebate shall forfeit three times the amount, Elkins Act, § 1, pp. 843-845.
- Carrier who gives rebates is guilty of misdemeanor and liable to fine, Elkins Act, § 1, pp. 843-845.
- Wilful failure to file, publish and observe schedules a misdemeanor, Elkins Act, § 1, pp. 843-845.
- Fine of corporation, for wilful failure to file, publish and observe schedules, Elkins Act, § 1, pp. 843-845.
- Penalties of corporations, convicted of misdemeanor, Elkins Act, § 1, pp. 843-845.
- When act of officer, agent, etc., shall be deemed act of carrier, Elkins Act, § 1, pp. 843-845.
- Corporation liable for acts of its officers, agents, etc., Elkins Act, § 1, pp. 843-845.
- Misdemeanor by carrier which is a corporation, Elkins Act, § 1, pp. 843-845.
- Action by attorney-general to collect forfeitures for taking rebates, six years' limitation on, Elkins Act, § 1, pp. 843-845.
- Power of court to compel giving of testimony or production of books by, Elkins Act, § 3, pp. 846, 847.
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5. Regulation by commission.

- Commission may inquire into management of business of carrier, § 12, pp. 850-852.
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- Commission may compel testimony and production of papers, etc., § 12, pp. 850-852.
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- Investigations of matters complained of, § 13, pp. 852, 853.
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COMMON CARRIERS — Continued:**5. Regulation by commission** — Continued:

Complaint to commission shall be by petition, § 13, pp. 852, 853.

Commission shall forward charges to carrier who shall satisfy complaint or answer before commission, § 13, pp. 852, 853.

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Power of commission to prescribe fair and reasonable regulations, § 15, pp. 853-855.

Commission may fix charges for services or instrumentalities furnished by carrier, § 15, pp. 853-855.

Commission may establish through routes and joint rates, § 15, pp. 853-855.

Power of commission to fix rates on complaint of a carrier, § 15, pp. 853-855.

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Carriers shall comply with orders of commission, § 16, pp. 855-858.

Commission may modify or suspend its orders, § 16, pp. 855-858.

Penalties for failure to obey orders, § 16, pp. 855-858.

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Judicial enforcement of orders, § 16, pp. 855-858.

Order for payment of damages, how enforced, § 16, pp. 855-858.

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Suit to enforce award, where brought and proper parties, § 16, pp. 855-858.

Complaints for recovery of damages must be filed within two years, § 16, pp. 855-858.

COMMON CARRIERS — Continued:**5. Regulation by commission — Continued:**

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Venue of suits to enjoin or suspend orders, § 16, pp. 855-858.

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Duty of attorney-general to file certificates under expediting act, § 16, pp. 855-858.

Injunction suspending order of, shall not be granted on less than five days' notice, § 16, pp. 855-858.

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Schedules, contracts, annual reports, etc., filed with commission shall be public records and prima facie evidence, § 16, pp. 855-858.

Rehearing of order on application of carrier, § 16a, pp. 858, 859.

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Contents of annual reports, § 20, pp. 860-863.

Forfeiture for failure to file annual report, § 20, pp. 860-863.

Commission may require monthly reports as to earnings, etc., § 20, pp. 860-863.

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Unlawful for examiner to divulge information gained on examination of books, etc., § 20, pp. 860-863.

False entry in books, a misdemeanor, § 20, pp. 860-863.

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Remedies provided by this Act are in addition to those existing at, § 22, pp. 863, 864.

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This Act shall not prevent issuance of, § 22, pp. 863, 864.

COMPANY.

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COMPENSATION.

See also, "CHARGES;" "EARNINGS;" "FARES;" "FREIGHTS;" "PROCEEDS;" "RATES."

Carrier shall charge only such as is specified in schedules, § 6, pp. 841-843.

Of its employees, commission may fix, § 18, p. 859.

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COMPLAINANT.

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COMPLAINT.

Shipper injured by violations may elect to make, to commission, § 9, p. 848.

To commission of violations of Act by carrier, § 13, pp. 852, 853.

By any state railroad commission, § 13, pp. 852, 853.

Form of, § 13, pp. 852, 853.

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Carrier shall satisfy or answer before commission, § 13, pp. 852, 853.

Shall not be dismissed for absence of direct damage to complainant, § 13, pp. 852, 853.

As to through route and joint rates, § 15, pp. 853-855.

Power of commission to fix rates after full hearing on a, § 15, pp. 853-855.

For recovery of damages, must be filed within two years, § 16, pp. 855-858.

CONCESSION.

Unlawful to offer, grant or give, or to solicit, accept or receive, Elkins Act, § 1, pp. 843-845.

CONCURRENCE.

Filing of evidence of, in joint tariff, § 6, pp. 841-843.

CONDITION PRECEDENT.

Filing and posting schedules a, to engaging in transportation as common carrier, § 6, pp. 841-843.

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Annual report of commission shall be transmitted to, § 21, p. 863.

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CONNIVANCE OF CARRIER.

As affecting false billing, etc., by shipper, § 10, pp. 848-850.

CONSENT OF CARRIER.

As affecting false billing, etc., by shipper, § 10, pp. 848-850.

CONSIDERATIONS.

Valuable, received as rebates, Elkins Act, § 1, pp. 843-845.

CONSIGNEE.

Schedules filed and posted by carrier shall state any rules or regulations which may affect the value of the service rendered to the, § 6, pp. 841-843.

Action by, to enforce joint and several liability of carrier and shipper inducing discriminations, § 11, p. 850.

Receiving rebate from carrier shall forfeit three times the amount, Elkins Act, § 1, pp. 843-845.

CONSIGNOR.

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Action by, to enforce joint or several liability of carrier giving and shipper inducing discriminations, § 10, pp. 848-850.

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CONTINUANCE.

Of pooling agreement, each day of, is separate offense, § 5, p. 841.

CONTINUOUS CARRIAGE.

Unlawful for carrier to prevent, § 7, p. 847.

CONTRACTS.

Term "railroad" includes roads operated under, § 1, pp. 837-840.

Unlawful for common carrier to enter into, for pooling of freights or earnings, § 5, p. 841.

For pooling of freights, each day of continuance is separate offense, § 5, p. 841.

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To prevent continuous carriage, unlawful, § 7, p. 847.

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Copies of, filed with commission shall be *prima facie* evidence, § 16, pp. 855-858.

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See also, "COMMON CARRIERS;" "CORPORATION COMMON CARRIER."

To which Act applies, § 1, pp. 837-840.

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Inducing unjust discrimination, liable with carrier to shipper injured, § 10, pp. 848-850.

Injured, may apply to court to enforce order of commission, § 16, pp. 855-858.

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Rehearing on order on application of any party, § 16a, pp. 858, 859.

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Receiving rebate from carrier shall forfeit three times the amount, Elkins Act, § 1, pp. 843-845.

CORPORATION COMMON CARRIER.

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An act or omission by, which if done or omitted to be done by any officer, receiver, agent, etc., would be a misdemeanor, is made a misdemeanor by such corporation, Elkins Act, § 1, pp. 843-845.

Who gives rebates is liable to fine and imprisonment, Elkins Act, § 1, pp. 843-845.

Fine upon conviction for wilful failure to file or observe schedules, Elkins Act, § 1, pp. 843-845.

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Jurisdiction over prosecutions for wrongfully giving or receiving free transportation, § 1, pp. 837-840.

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Of shipper for false billing, classification, etc., § 10, pp. 848-850.

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Initial carrier liable for, to property in transit, § 20, pp. 860-863.

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Unlawful for carriers to enter into agreement, etc., to divide, of competing roads, § 5, p. 847.

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Criminal liability of carrier for, § 10, pp. 848-850.

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Of officer, agent, etc., when deemed failure of carrier or shipper, Elkins Act, § 1, pp. 843-845.

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Schedules filed and posted by carrier shall separately state any rules or regulations which affect the aggregate, § 6, pp. 841-843.

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Carrier shall charge only those specified in schedules, § 6, pp. 841-843.

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For falsification or mutilation of accounts of carrier, § 20, pp. 860-863.

May be imposed for giving or receiving rebates, Elkins Act, § 1, pp. 843-845.

Of corporation common carrier for wilful failure to file, publish or observe schedules, Elkins Act, § 1, pp. 843-845.

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Not to receive undue preference from carriers, § 3, p. 840.

May complain to commission of violations by carrier, § 13, pp. 852, 853.

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Application of Act to, § 1, pp. 837-840.

Rebates and discrimination in transportation of, unlawful, Elkins Act, § 1, pp. 837-840.

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Filing of through rates for shipment of freight from U. S. through, to another point in U. S., § 6, pp. 841-843.

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Freight shipped through foreign country to point in U. S., on which through rate has not been made public, shall be subject to customs duties as if of, § 6, pp. 841-843.

FORFEITURES.

For failure to obey orders of the commission, § 16, pp. 855-858.

Shall be recoverable in civil suit, § 16, pp. 855-858.

Various U. S. district attorneys shall sue to recover, § 16, pp. 855-858.

Shall be payable into treasury of United States, § 16, pp. 855-858.

For refusal to keep accounts, etc., as prescribed by commission and give commission access thereto, § 20, pp. 860-863.

For failure to file annual or monthly report, § 20, pp. 860-863.

Shipper receiving rebate shall be liable for three times the amount as, Elkins Act, § 1, pp. 843-845.

Six years' statute of limitations on recovery of, Elkins Act, § 1, pp. 843-845.

Action by attorney-general to recover, Elkins Act, § 1, pp. 843-845.

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FRANCHISES.

Annual report of carrier shall show value of, § 20, pp. 860-863.

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Special privilege as to, under mileage tickets, § 22, pp. 863, 864.

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FREE TICKETS.

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Penalty for using, § 1, pp. 837-840.

FREE TRANSPORTATION.

May be given only to enumerated persons, § 1, pp. 837-840.

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See also, "PROPERTY."

Charges for transporting, shall be reasonable and just, § 1, pp. 837-840.

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Carriers shall not discriminate in transporting, § 2, p. 840; § 3, p. 840.

Duty of connecting carriers as to transportation of, § 3, p. 840.

For transportation of, commission may permit carrier to charge less for longer than for shorter distances, § 4, pp. 840, 841.

Schedules filed and posted by carrier shall contain classifications of, in force, § 6, pp. 841-843.

Two copies of schedules showing rates, etc., shall be kept posted in each station where freight is received for transportation, § 6, pp. 841-843.

Shipped through foreign country, if through rate has not been made public, shall be subject to customs duties as if of foreign production, § 6, pp. 841-843.

Received in U. S. to be carried through a foreign country to any place in U. S.; filing of schedules of rates for, § 6, pp. 841-843.

Unlawful to prevent carriage of, from being continuous, § 7, p. 847.

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See, "CARS."

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Included in term "railroads," § 1, pp. 837-840.

FREIGHTS.

See also, "CHARGES;" "COMPENSATION;" "EARNINGS;" "FARES;" "PROCEEDS;" "RATES."

Unlawful for carrier to enter into agreement, etc. for pooling of, § 5, p. 841.

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Included in term "railroad," § 1, pp. 837-840.

FRUIT.

Caretakers of, may be given free transportation, § 1, pp. 837-840.

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GENERAL ORDER.

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When included in term, "railroad," § 1, pp. 837-840.

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Free transportation may be given to, § 1, pp. 837-840.

This Act shall not prevent carriage of, at reduced rates, § 22, pp. 863, 864.

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Soldiers' and sailors', transportation of inmates of, at reduced rates, § 22, pp. 863, 864.

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Free transportation may be given to inmates of, § 1, pp. 837-840.

Agents of, when accompanying indigent or homeless persons, may be given free transportation, § 1, pp. 837-840.

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Services in connection with, included in term "transportation," § 1, pp. 837-840.

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Of examiner wrongfully divulging information, § 20, pp. 860-863.

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For giving or receiving rebates, etc., Elkins Act, § 1, pp. 843-845.

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Annual report of carrier shall show amounts expended for, § 20, pp. 860-863.

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Free transportation may be given to, § 1, pp. 837-840.

Reduced rates for transportation of, § 22, pp. 863, 864.

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Carrier to discriminate unjustly, a misdemeanor, § 10, pp. 848-850.

INEFFICIENCY.

As ground for removal of commissioner, § 11, p. 850.

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Liable for injuries to property in transit, § 20, pp. 860-863.

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Court may enforce orders of commission by, § 16, pp. 855-858.

Suspending enforcement or order, shall be granted only on five days' notice to commission, § 16, pp. 855-858.

Venue of suits to obtain, against orders of commission, § 16, pp. 855-858.

Expediting act applicable to suits for, against orders of commission, § 16, pp. 855-858.

Appeal from decree granting, must be taken within thirty days and shall have priority, § 16, pp. 855-858.

INJURY.

Initial carrier liable for, to property in transit, § 20, pp. 860-863.

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Of soldiers' and sailors' homes, transportation at reduced rates, § 22, pp. 863, 864.

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See also, "COMMISSION;" "INVESTIGATIONS."

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Schedules of rates, etc., charged by carrier shall be kept open to inspection by the public, § 6, pp. 841-843.

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Which are included in term "transportation," § 1, pp. 837-840.

Payment by carrier to owner furnishing any, § 15, pp. 853-855.

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Of passes between carriers permissible, § 1, pp. 837-840; § 22, pp. 863, 864.

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INTERCHANGEABLE 5,000 MILE TICKETS.

This Act shall not prevent issuance of, § 22, pp. 863, 864.

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Suspending order of commission shall be granted only on five days' notice to commission, § 16, pp. 855-858.

Appeal from, must be taken within thirty days and shall have priority, § 16, pp. 855-858.

INTERRUPTION.

Made by carrier, shall not prevent continuous carriage, § 7, p. 847.

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See, "COMMISSION."

INTERSTATE COMMERCE COMMISSIONERS.

See also, "COMMISSION."

Appointment, removal, qualifications and procedure of, § 11, p. 850.

Term of office, § 11, p. 850; § 24, p. 865.

Persons holding official relation to carriers, or owning stocks or bonds thereof, or pecuniarily interested therein may not be, § 11, p. 850.

Number of, § 11, p. 850; § 24, p. 865.

Shall not sit in any proceeding in which they are pecuniarily interested, § 17, p. 859.

May administer oaths or sign subpoenas, § 17, p. 859.

Amount of salary, § 18, p. 859; § 24, p. 865.

Shall be reimbursed for expenses, including transportation, § 18, p. 859.

One or more may conduct investigations, § 19, p. 860.

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INTERSTATE TRAFFIC.

Application of Act to, § 1, pp. 837-840.

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Act not applicable to, § 1, pp. 837-840.

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By commission upon failure of carrier to install switches, § 1, pp. 837-840.

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When commission may make, of matters complained of in petition, § 13, pp. 852, 853.

INVESTIGATIONS—Continued:

Of matters complained of by any state railroad commission, § 13, pp. 852, 853.

Commission may make, upon its own motion, § 13, pp. 852, 853.

Means and manner of making, § 13, pp. 852, 853.

Commission shall make written report of each, § 14, p. 853.

Commission may make authorized publication of reports of, § 14, p. 853.

Authorized publication of reports of, shall be competent evidence, § 14, p. 853.

Reports shall be entered of record and copies furnished to parties, § 14, p. 853.

Report of, shall include decision, order, etc., § 14, p. 853.

If damages are awarded, report shall include findings of fact on which award is made, § 14, p. 853.

Certain documents shall be *prima facie* evidence on, § 16, pp. 855–858.

One or more commissioners may conduct, § 19, p. 860.

JOINT CHARGES.

See, "JOINT RATES."

JOINT FARES.

See, "JOINT RATES."

JOINT INTERCHANGEABLE 5,000 MILE TICKETS.

This Act shall not prevent issuance of, § 22, pp. 863, 864.

JOINT OR SEVERAL.

Liability of shipper inducing unjust discrimination, to shipper discriminated against, § 10, pp. 848–850.

JOINT RATES.

See also, "JOINT TARIFFS;" "RATES;" "TARIFF SCHEDULES."

Filing and publishing of schedules showing fares, etc., when through route and joint rate have been established, § 6, pp. 841–843.

Filing, etc., of schedules of fares where no through route and joint rate has been established, § 6, pp. 841–843.

No change in, except on thirty days' notice to the commission and the public, § 6, pp. 841–843.

When commission may permit changes in, on less than specified notice § 6, pp. 841–843.

Commission may establish, § 15, pp. 853–855.

Supplemental order for division of, § 15, pp. 853–855.

Where one of connecting carriers is a water line, § 15, pp. 853–855.

JOINT TARIFFS.

See also, "CHARGES;" "FARES;" "RATES;" "TARIFF SCHEDULES."

Commission may prescribe or alter form of, § 6, pp. 841–843.

JOINT TARIFFS — Continued:

Names of carriers who are parties to, shall be named therein, § 6, pp. 841-843.

Each party to, shall file with the commission evidence of concurrence therein, § 6, pp. 841-843.

Filing of, as basis for issuance of joint interchangeable mileage, § 22, pp. 863, 864.

JUDICIALLY NOTICED.

Seal of commission shall be, § 11, p. 850.

JURISDICTION.

Over prosecutions for wrongfully giving or receiving free transportations, § 1, pp. 837-840.

Of suits to set aside or suspended orders of commission, § 16, pp. 855-858.

Of suits to enforce orders for payment of damages, § 16, pp. 855-858.

Of suits to recover forfeitures, § 16, pp. 855-858.

Of courts, to punish rebates and failure to file, publish and observe tariffs, Elkins Act, § 1, pp. 843-845.

Of Circuit Court in proceedings instituted by commission to compel discontinuance of unlawful practices as to rates, Elkins Act, § 3, pp. 846, 847.

JUST AND REASONABLE.

Commission may fix, charges, § 15, pp. 855-858.

LADING, BILL OF.

See, "BILL OF LADING."

LATERAL LINE.

Duty of railroad to furnish switch connections upon application of, § 1, pp. 837-840.

LEASE.

Term "railroad" includes roads operated under, § 1, pp. 837-840.

LEGAL RATE.

That filed by carrier with commission shall be conclusively deemed to be, Elkins Act, § 1, pp. 843-845.

LEGISLATION.

Commission may recommend additional, in its report to Congress, § 21, p. 863.

LIMITATION OF ACTION.

On complaints for damages, two years, § 16, pp. 855-858.

Exception as to damage claims accruing prior to the passage of this act, § 16, pp. 855-858.

On proceedings to enforce order for payment or damages, one year, § 16, pp. 855-858.

LIMITATION OF ACTION — Continued:

Six years' statute of, on actions to recover forfeiture for accepting rebates, Elkins Act, § 1, pp. 843-845.

LINEMEN.

Of telephone and telegraph companies may be given free transportation, § 1, pp. 837-840.

LIVE STOCK.

Care takers of, may be given free transportation, § 1, pp. 837-840.

LOCALITIES.

Not to receive undue preference from carriers, § 3, p. 840.

LONG AND SHORT HAUL.

Compensation for, § 4, pp. 840, 841.

Commission may relieve common carrier from operation of section of Act concerning, § 4, pp. 840, 841.

LUMBER.

May be transported by railroad even though owned and manufactured by it, § 1, pp. 837-840.

MAIL.

Service of orders by, § 16, pp. 855-858.

MALFEASANCE IN OFFICE.

As ground for removal of commissioner, § 11, p. 850.

MANAGERS.

See, "BOARDS OF MANAGERS."

MANDAMUS.

Court may enforce orders of commission by, § 16, pp. 855-858.

Courts may issue, to enforce any provision of this Act, § 20, pp. 860-863.

Will lie to compel carrier to move traffic, furnish cars, etc., § 23, pp. 864, 865.

Procedure of pleadings raise question of proper compensation to carrier for service to be enforced, § 23, pp. 864, 865.

Remedy by, is cumulative, § 23, pp. 864, 865.

MANUFACTURING SOCIETY.

May complain to commission of violations by carrier, § 23, pp. 852, 853.

MATERIAL OF WAR.

In time of war or threatened war, precedence shall be given to transportation of, § 6, pp. 841-843.

MAXIMUM RATES.

See also, "RATES."

Power of commission to prescribe, § 15, pp. 853-855.

MEMORANDA.

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MERCANTILE SOCIETY.

May complain to commission of violations of Act by carrier, § 13, pp. 852, 853.

MILEAGE.

Of witnesses before commission, as in United States courts, § 18, p. 859.

Act shall not prevent issuance of joint interchangeable tickets, § 22, pp. 863-864.

Special baggage privileges to persons traveling on, § 22, pp. 863, 864.

MILITARY TRAFFIC.

Shall be given precedence in time of war or threatened war, and carriers shall adopt every means in their control to expedite, § 6, pp. 841-843.

MINISTERS OF RELIGION.

Free transportation may be given to, § 1, pp. 837-840.

Carrier may give reduced rates to, § 22, pp. 863, 864.

MISDEMEANOR.

Giving of free transportation in violation of Act is a, § 1, pp. 837-840.

Violations of this Act by carrier a, § 10, pp. 848-850.

False billing, classification, weighing, etc., by shipper, a, § 10, pp. 848-850.

False billing, etc., by carrier a, § 10, pp. 848-850.

Inducing unjust discrimination a, § 10, pp. 848-850.

Wilful failure to file, publish, and observe schedules is a, Elkins Act, § 1, pp. 843-845.

Doing by corporation of acts which, if done by a trustee, director, officer, receiver, etc. thereof would constitute a misdemeanor, constitutes a misdemeanor by the corporation, Elkins Act, § 1, pp. 843-845.

Corporation common carrier convicted of, shall be subject to like penalties as persons, Elkins Act, § 1, pp. 843-845.

Fine and imprisonment on conviction of, for giving or receiving rebates, etc., Elkins Act, § 1, pp. 843-845.

MODIFICATION.

Of order of commission, § 15, pp. 853-855.

MODIFY.

Commission may, its orders, § 16, pp. 855-858.

Upon rehearing commission may, its order, § 16a, pp. 858, 859.

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Payment of, to induce carrier to discriminate unjustly, § 10, pp. 848-850.

Petition to enforce order for payment of, must be filed within one year, § 16, pp. 855-858.

Order for payment of, as damages, how enforced, § 16, pp. 855-858.

Receipt of, as rebate or offset, Elkins Act, § 1, pp. 843-845.

MONTHLY REPORTS.

See, "REPORTS."

MOVEMENT OF TRAFFIC.

Commission may prescribe forms of records of, § 20, pp. 860-863.

MUNICIPAL GOVERNMENT.

This Act shall not prevent handling of property for a, at a reduced rate, § 22, pp. 863, 864.

Reduced rates to a, for transportation of indigent persons, § 22, pp. 863, 864.

MUNICIPALITY.

See, "BODY POLITIC."

MUNICIPAL ORGANIZATION.

May complain to commission of violations by carrier, § 13, pp. 852, 853.

MUTILATION.

Of accounts, etc., a misdemeanor, § 20, pp. 860-863.

NAMES.

Of carriers parties to a joint tariff shall be specified therein, § 6, pp. 841-843.

NATIONAL SOLDIERS' AND SAILORS' HOMES.

See, "SOLDIERS' AND SAILORS' HOMES."

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See, "GAS."

NECESSARY PURPOSE.

As affecting continuous carriage, § 7, p. 847.

NEGLECT OF DUTY.

As ground for removal of commissioner, § 11, p. 850.

NET PROCEEDS.

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NEWSBOYS.

Free transportation may be given to, § 1, pp. 837-840.

NOTICE.

No change shall be made in rates, fares, etc., except on, of thirty days to commission and public, § 6, pp. 841-843.

When rates may be changed on less than that specified, § 6, pp. 841-843.

Of desire to take testimony by deposition, § 12, pp. 850-852.

Of suspending or modification of orders by commission, § 16, pp. 855-858.

Orders shall be enjoined or suspended only on five days' notice to commission, § 16, pp. 855-858.

Forms and service of notice shall conform to that in United States courts, § 17, p. 859.

NURSES.

Attendant upon persons injured in wrecks may be given free transportation, § 1, pp. 837-840.

OATH.

Members of commission may administer, § 17, p. 859.

Special examiners may administer, § 20, pp. 860-863.

Annual report of carrier shall be made under, § 20, pp. 860-863.

On annual report of carrier, before whom may be taken, § 20, pp. 860-863.

OFFENSE.

Each day of continuance of pooling agreement shall be deemed a separate, § 5, p. 841.

Each distinct violation of Act and each day of continuance, a separate, § 16, pp. 855-858.

Departure from rates filed, etc., shall be deemed, under this Act, Elkins Act, § 1, pp. 843-845.

Of rebating, etc., where triable and punishable, Elkins Act, § 1, pp. 843-845.

OFFICER.

Free transportation may be given to officers of carriers and their families, § 1, pp. 837-840.

Liability of corporation common carrier for acts of, § 6, pp. 841-843.

Court may compel to testify, § 9, p. 848.

Inducing of carrier to discriminate unjustly, § 10, pp. 848-850.

Service of order of commission on officer of carrier, § 16, pp. 855-858.

Of carrier, forfeit for failure to obey order, § 16, pp. 855-858.

Of railroad, may be given free transportation, § 22, pp. 863, 864.

When unlawful act of, shall be deemed act of carrier or shipper, Elkins Act, § 1, pp. 843-845.

OFFICES.

Two copies of schedules showing rates, etc., shall be kept posted in all, where passengers or freight are received for transportation, § 6, pp. 841-843.

Commission may hire, § 18, p. 859.

Principal office of commission shall be in Washington, § 19, p. 860.

OFFICE SUPPLIES.

Commission may procure, § 18, p. 859.

OFFSET.

See also, "DISCRIMINATION;" "RATES;" "REBATES;" "REFUND;" "TARIFF SCHEDULES."

Shipper receiving, shall forfeit three times the amount, Elkins Act, § 1, pp. 843-845.

OIL.

Application of Act to transportation of, by pipe lines, § 1, pp. 837-840.

OMISSION.

Of officer, agent, etc., when deemed omission of carrier or shipper, Elkins Act, § 1, pp. 843-845.

OPEN TO PUBLIC INSPECTION.

Schedules of rates, etc., charged by carrier shall be kept, § 6, pp. 841-843.

OPERATING EXPENSES.

Annual report of carrier shall show its, § 20, pp. 860-863.

OPERATING TRUSTEES.

Provision of Act giving commission power to prescribe form of, and to have access to, and inspect books, accounts, etc., of carriers is applicable to, § 20, pp. 860-863.

ORDERS OF COMMISSION.

Directing carrier to install switches, § 1, pp. 837-840.

Report of investigation by commission shall include its, § 14, p. 853.

Fixing rates or making regulations, § 15, pp. 853-855.

As to payment by carrier for services or instrumentalities furnished, § 15, pp. 853-855.

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Supplemental, prescribing division of joint rates, § 15, pp. 853-855.

When shall take effect, § 15, pp. 853-855.

Suspension or modification, § 15, pp. 853-855.

May be served by mail, § 16, pp. 855-858.

ORDERS OF COMMISSION — Continued:

Carrier shall comply with, § 16, pp. 855-858.

Penalties for failure to obey, § 16, pp. 855-858.

Bringing of civil suit for forfeitures for failure to obey, § 16, pp. 855-858.

Commission or party injured may ask court to enforce, by injunction or mandamus, § 16, pp. 855-858.

Suit to enforce, where brought and proper parties, § 16, pp. 855-858.

Appeal to Supreme Court on petition to enforce, § 16, pp. 855-858.

For payment of damages, how enforced, § 16, pp. 855-858.

Petition to enforce, for payment of damages shall be filed within one year, § 16, pp. 855-858.

Venue of suits to set aside or suspend, § 16, pp. 855-858.

Expediting act applicable to suits to enjoin or set aside, § 16, pp. 855-858.

Commission may suspend or modify, § 16, pp. 855-858.

Application for rehearing on, § 16a, pp. 858, 859.

Commission may reverse or modify at rehearing, § 16a, pp. 858, 859.

Rehearing shall not excuse carrier from complying with, § 16a, pp. 858, 859.

May be made against all interested persons who have been made additional parties to proceedings, Elkins Act, § 2, p. 845.

PAPERS.

See, "BOOKS AND PAPERS."

PARTIES.

To joint tariff, shall be specifically named therein, § 6, pp. 841-843.

To joint tariff, shall file with commission evidence of concurrence therein, § 6, pp. 841-843.

All persons interested may be made, Elkins Act, § 2, p. 845.

Against whom orders of court directing observance of tariffs or discontinuance of discriminations may be enforced. Elkins Act, § 3, pp. 846, 847.

PASSENGERS.

See also, "PERSONS."

Application of Act to transportation of, by railroads, § 1, pp. 837-840.

Charges for transportation of, shall be just and reasonable, § 1, pp. 837-840.

Provisions as to free transportation of, § 1, pp. 837-840.

Discrimination in rates for transportation of, prohibited, § 2, p. 840.

Fares for transportation of, for longer and shorter distances, § 4, pp. 840, 841.

PASSENGERS— Continued:

Commission may permit carrier to charge less for longer than for shorter distances, for transportation of, § 4, pp. 840, 841.

Two copies of schedules of rates, etc., shall be kept posted in each station, etc., where passengers are received for transportation, § 6, pp. 841-843.

Carrier shall not transport, unless fares, etc., have been filed and published, § 6, pp. 841-843.

Schedules filed by carrier shall plainly state the places between which passengers will be carried, § 6, pp. 841-843.

Schedules filed and posted by carrier shall state any rules or regulations affecting the value of the service rendered to, § 6, pp. 841-843.

This act shall not prevent reduced rates for transportation of certain classes of, § 22, pp. 863, 864,

PASSES.

May be given only to enumerated persons, § 1, pp. 837-840; § 22, pp. 863, 864.

Scope of terms "employees" and "families" as used in provision as to giving of, § 1, pp. 837-840.

Penalty for unlawfully using, § 1, pp. 837-840.

Railroads may exchange, § 22, pp. 863, 864.

PENALTIES.

See also, "FINES."

For giving of free transportation in violation of Act, § 1, pp. 837-840.

For receiving free transportation in violation of Act, § 1, pp. 837-840.

For failure to obey orders of commission, § 16, pp. 855-858.

For failing to file annual reports, § 20, pp. 860-863.

For corporation common carrier convicted of misdemeanor, Elkins Act, § 1, pp. 843-845.

PENDING LITIGATION.

This Act shall not affect, § 22, pp. 863, 864.

PENSIONED EMPLOYEES.

Included in term "employees" as used in provision as to giving of free transportation, § 1, pp. 837-840.

PEREMPTORY MANDAMUS.

See, "MANDAMUS."

PERSON.

Any party may appear before commission in person or by attorney, § 17, p. 859.

PERSONS.

To whom this Act applies, § 1, pp. 837-840.

To whom free transportation may be given, § 1, pp. 837-840; § 22, pp. 863, 864.

Receiving free transportation in violation of Act liable to penalty, § 1, pp. 837-840.

Not to receive undue preference from carriers, § 3, p. 840.

Carrier shall not extend to, any privileges or facilities not specified in tariffs, § 6, pp. 841-843.

Injured by violations of this Act may recover damages from carrier, § 8, p. 847.

Damaged by violations of this Act may complain to commission or sue carrier in federal court, § 9, p. 848.

Criminal liability of, inducing carrier to discriminate unjustly, § 10, pp. 848-850.

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Criminal liability for false billing, etc., § 10, pp. 848-850.

Disobeying subpoena of commission, may be punished for contempt of court, § 12, pp. 850-852.

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Injured by violations of order of commission may apply to court to enforce such order, § 16, pp. 855-858.

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This Act shall not prevent carriage of homeless or destitute, at reduced rates, § 22, pp. 863, 864.

Employed by carrier or shipper, when acts of, shall be deemed acts of employer, Elkins Act, § 1, pp. 843-845.

Who give or receive rebates are guilty of misdemeanor and punishable by fine or imprisonment, Elkins Act, § 1, pp. 843-845.

Accepting rebates or offsets from carriers shall forfeit three times the amount, Elkins Act, § 1, pp. 843-845.

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§ 11, p. 850.

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Of freights or earnings, unlawful for carrier to enter into agreement for, § 5, p. 841.

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Any party to, may apply for rehearing in, § 16a, pp. 858, 859.

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Unlawful for carriers to agree to divide, of earnings of competing railroads, etc., § 5, p. 841.

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Application of Act to transportation of, by railroads, § 1, pp. 837-840.

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Carrier shall not transport, unless rates, etc., for same have been filed and published, § 6, pp. 841-843.

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Criminal liability of carrier for false billing, etc., in transportation of, § 10, pp. 848-850.

Criminal liability of shipper for false billing, weighing or classification of, § 10, pp. 848-850.

Payment by carrier to owner of, for any service or instrumentality in connection with transportation, § 15, pp. 853-855.

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Initial carrier liable for injuries to, in transit, § 20, pp. 860-863.

Initial carrier may recover from carrier on whose lines property was injured, § 20, pp. 860-863.

No exemption of initial carrier from liability for injuries to, § 20, pp. 860-863.

This Act shall not prevent transportation of, at reduced rate for government, charitable purposes, etc., § 22, pp. 863, 864.

Unlawful to give or receive rebates respecting transportation of, Elkins Act, § 1, pp. 843-845.

Forfeiture for accepting rebates in transportation of, Elkins Act, § 1, pp. 843-845.

PROSECUTIONS.

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PUBLIC.

Copies of schedules for use of, shall be kept posted in each station, etc., § 6, pp. 841-843.

Schedules of rates, etc., charged by carrier shall be kept open to inspection of, § 6, pp. 841-843.

No change shall be made in the rates, etc., except on thirty days' notice to commission and, § 6, pp. 841-843.

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Carrier shall, schedule of rates and fares and changes therein, § 6, pp. 841-843.

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1. General provisions.

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2. Powers, duties and liabilities.

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Duty to furnish switch connections, § 1, pp. 837-840.

Shall not transport articles manufactured, produced or owned by it except for use in business as carrier, § 1, pp. 837-840.

Shall not discriminate as to rates and charges, § 2, p. 840.

Shall not give undue preference to any shipper, locality or kind of traffic, § 3, p. 840.

Shall not discriminate between connecting lines as to rates and charges, § 3, p. 840.

Shall afford facilities for interchange of traffic with connecting lines, § 3, p. 840.

Not required to give use of tracks or terminal facilities to connecting carriers, § 3, p. 840.

Compensation for long and short hauls, § 4, pp. 840, 841.

May apply to commission for relief from long and short haul section of this Act, § 4, pp. 840.

Unlawful for any, to enter pooling agreement or combination, § 5, p. 841.

Each day of continuance of agreement for pooling of freights, etc., is separate offense, § 5, p. 841.

At demand of President, shall give precedence to and expedite military traffic, § 6, pp. 841-843.

Shall not prevent continuous carriage, § 7, p. 847.

Violating Act is liable in damages to persons injured, § 8, p. 847.

Persons injured by violations by, must elect between complaint to commission and suit in federal court, § 9, p. 848.

Court may compel officer, agent, etc., of railroad to testify, § 9, p. 848.

RAILROADS — Continued:**2. Powers, duties and liabilities** — Continued:

- Inducing or abetting, to discriminate unjustly, § 19, pp. 848-850.
- Criminal liability of railroads false billing, classification, etc., § 10, pp. 848-850.
- Criminal liability of shipper for false billing, etc., of property delivered to, § 10, pp. 848-850.
- Fine may be imposed on railroads for violating Act, § 10, pp. 848-850.
- Criminal liability of, for acts declared unlawful, § 10, pp. 848-850.
- Joint or severally liable with shipper inducing unjust discriminations, § 10, pp. 848-850.
- Bringing of civil suit against, to recover forfeitures, § 16, pp. 855-858.
- Shall issue bills of lading, § 20, pp. 860-863.
- Initial carrier liable for damage to property in transit, § 20, pp. 860-863.
- Initial carrier may recover from, on whose lines property was injured, § 20, pp. 860-863.
- Mandamus will lie to enforce any provision of this Act against, § 20, pp. 860-863.
- False entry in books of, § 20, pp. 860-863.
- Mutilation of records of, § 20, pp. 860-863.
- Failure to make full entries, § 20, pp. 860-863.
- May not contract for exemption from liability as initial carrier, § 20, pp. 860-863.
- May carry its employees free, § 1, pp. 837-840; § 22, pp. 863, 864.
- May give free transportation only to enumerated classes of persons, § 1, pp. 837-840; § 22, pp. 863, 864.
- May give reduced rates to enumerated classes of persons, § 22, pp. 863, 864.
- May carry certain classes of property free or at reduced rates, § 22, pp. 863, 864.
- May exchange passes with other lines, § 22, pp. 863, 864.
- May issue mileage, commutation and excursion tickets, § 22, pp. 863, 864.
- May issue joint, interchangeable 5,000 mile tickets, with special free baggage privileges, § 22, pp. 863, 864.
- Mandamus lies to compel, to furnish cars and move traffic, § 23, pp. 864, 865.

RAILROADS — Continued:**3. Tariff schedules.**

Shall file with commission, print and keep open to public inspection schedules showing all its rates, fares, etc., § 6, pp. 841-843.

Copies of, shall be kept posted in two public and conspicuous places in each station, etc., § 6, pp. 841-843.

Receiving freight in United States to be carried through a foreign country to any place in the United States, shall print, file and post schedules of through rates, § 6, pp. 841-843.

Shall not engage in transportation until schedules are published, § 6, pp. 841-843.

Schedules shall be plainly printed in large type, § 6, pp. 841-843.

Commission may prescribe and alter form of schedules to be filed by, § 6, pp. 841-843.

Shall charge only rates and fares specified in schedules, § 6, pp. 841-843.

Carrier shall not refund or remit any portion of rates and charges specified in schedules, § 6, pp. 841-843.

Shall not extend to any shipper or person any privileges or facilities not specified in tariffs, § 6, pp. 841-843.

Contents of schedules, § 6, pp. 841-843.

Schedules shall plainly state the places between which passengers and property will be carried, § 6, pp. 841-843.

Schedules shall contain classification of freight in force, § 6, pp. 841-843.

Schedules shall separately state all terminal charges, storage charges, icing charges, etc., § 6, pp. 841-843.

Schedules shall separately state all privileges or facilities granted or allowed, § 6, pp. 841-843.

Schedules shall state separately all rules or regulations which affect the aggregate rates or the value of the service rendered, § 6, pp. 841-843.

Shall file tariffs as basis for joint interchangeable mileage, § 22, pp. 863, 864.

The names of the parties to a joint tariff shall be specified therein, § 6, pp. 841-843.

Copies of all contracts and agreements, relating to traffic shall be filed with commission, § 6, pp. 841-843.

Schedules, contracts, annual reports, etc., filed with commission shall be public records, and *prima facie* evidence, § 16, pp. 855-858.

RAILROADS — Continued:**3. Tariff schedules** — Continued:

No change shall be made in rates, etc., except upon thirty days' notice to the commission and to the public, § 6, pp. 841-843.

Commission may allow changes in rates, etc., on less than specified notice, in special cases, § 6, pp. 841-843.

4. Under Elkins Act.

Unlawful to offer, grant or give rebates, Elkins Act, § 1, pp. 843-845.

Wilful failure to file, publish and observe schedules a misdemeanor, Elkins Act, § 1, pp. 843-845.

Departure from rates filed by shall be deemed an offense under this Act, Elkins Act, § 1, pp. 843-845.

Misdemeanor by corporation common carrier, Elkins Act, § 1, pp. 843-845.

Penalties of corporation, convicted of misdemeanor, Elkins Act, § 1, pp. 843-845.

Shipper accepting rebate from, shall forfeit three times the amount, Elkins Act, § 1, pp. 843-845.

Rate filed with commission by, shall be conclusively deemed the legal rate, Elkins Act, § 1, pp. 843-845.

When act of officer, agent, etc., shall be deemed act of, Elkins Act, § 1, pp. 843-845.

Fine of corporation common carrier for wilful failure to file, publish and observe schedules, Elkins Act, § 1, pp. 843-845.

Compelling charging of published rates, Elkins Act, § 3, pp. 846, 847.

5. Regulation by commission.

Complaints by shippers upon failure to install switches, § 1, pp. 837-840.

Commission may inquire into management of business of railroad, § 12, pp. 850-852.

Commission may prosecute for violations of Act, § 12, pp. 850-852.

Commission may compel witnesses to testify, § 12, pp. 850-852.

Punishment for disobedience to subpoena, § 12, pp. 850-852.

Contempt of court, § 12, pp. 850-852.

Taking testimony by deposition, § 12, pp. 850-852.

Petition to commission, complaining of violations of Act, § 13, pp. 852, 853.

Complaint by state commission, § 13, pp. 852, 853.

RAILROADS — Continued:**5. Regulation by commission — Continued:**

When commission may investigate matters complained of, § 13, pp. 852, 853.

No complaint shall be dismissed for absence of direct damage to complainant, § 13, pp. 852, 853.

Commission shall forward charges to, who shall satisfy complaint or answer before commission, § 13, pp. 852, 853.

Commission may investigate, upon its own motion, § 13, pp. 852, 853.

Copy of report of investigation shall be furnished to railroad, § 14, p. 853.

Commission may fix charges for services or instrumentalities furnished by shipper, § 15, pp. 853-855.

Power of commission to fix maximum rates, § 15, pp. 853-855.

Commission may establish through routes, and joint rates, § 15, pp. 853-855.

Supplemental order of commission prescribing division of joint rate, § 15, pp. 853-855.

Power of commission to make fair and reasonable regulations, § 15, pp. 853-855.

When orders of commission as to rates and regulations shall go into effect, § 15, pp. 853-855.

Service of order of commission, § 16, pp. 855-858.

Railroads shall comply with orders of commission, § 16, pp. 855-858.

Agent or representative liable for failure to obey order of commission, § 16, pp. 855-858.

Penalties for failure to obey order, § 16, pp. 855-858.

Commission may modify or suspend its orders, § 16, pp. 855-858.

Judicial enforcement of orders, § 16, pp. 855-858.

Appeal to U. S. Supreme Court on petition to enforce order, § 16, pp. 855-858.

Order for payment of damages, how enforced, § 16, pp. 855-858.

Complaints for recovery of damages must be filed within two years, § 16, pp. 855-858.

Suit to enforce award against railroad, where brought and proper parties, § 16, pp. 855-858.

Petition to enforce order for payment of damages shall be filed within one year, § 16, pp. 855-858.

Injunction restraining order may be granted only on five days' notice, § 16, pp. 855-858.

RAILROADS — Continued:**5. Regulation by commission — Continued:**

Expediting act applicable to suits to set aside or suspend orders against, § 16, pp. 855-858.

Venue of suits to enjoin or suspend orders, § 16, pp. 855-858.

Rehearing on order on application of railroad, § 16a, pp. 858, 859.

Investigations into business of railroads may be conducted anywhere in United States, § 19, p. 860.

Commission may require annual report, § 20, pp. 860-863.

Contents of annual reports, § 20, pp. 860-863.

Forfeiture for failure to file reports promptly, § 20, pp. 860-863.

Commission may require monthly reports, § 20, pp. 860-863.

Commission may require uniform system of accounts, § 20, pp. 860-863.

Commission may prescribe forms for accounts, etc., § 20, pp. 860-863.

Commission shall have access to books and records, § 20, pp. 860-863.

When unlawful for examiner to disclose information obtained upon examination of books, etc., § 20, pp. 860-863.

False entries or failure to make entries in books, and mutilation of records are misdemeanors, § 20, pp. 860-863.

RAILWAY MAIL SERVICE.

Employees may be given free transportation, § 1, pp. 837-840.

RATES.

See also, "CHARGES;" "COMPENSATION;" "EARNINGS;" "FARES;" "FREIGHTS;" "JOINT RATES;" "JOINT TARIFFS;" "TARIFF SCHEDULES."

For transportation shall be just and reasonable, § 1, pp. 837-840.

Establishment of rates applicable to through routes, § 1, pp. 837-840.

Unjust discrimination in, prohibited, § 2, p. 840.

Giving of undue preference or advantage as to, prohibited, § 3, p. 840.

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Carriers shall not charge more for shorter than longer haul over same line in same direction, § 4, pp. 840, 841.

Commission may relieve from operation of long and short haul rule, § 4, pp. 840, 841.

Common carrier shall file, print and keep open to public inspection schedules showing all its, § 6, pp. 841-843.

RATES — Continued:

- Carrier shall not transport passengers or property unless rates have been published, § 6, pp. 841-843.
- Filing of schedules showing rates where no through route or joint rate has been established, § 6, pp. 841-843.
- Carrier shall not remit or refund any portion of, specified in schedules, § 6, pp. 841-843.
- Schedules filed and posted by carrier shall separately state any rules or regulations which affect aggregate, § 6, pp. 841-843.
- No change in, except on thirty days' notice to the commission and the public, § 6, pp. 841-843.
- When changes in, may be made on less than specified notice, § 6, pp. 841-843.
- False billing, etc., by shipper to secure transportation at less than regular, § 10, pp. 848-850.
- False billing, etc., by carrier to give transportation at less than the regular, § 10, pp. 848-850.
- Power of commission to prescribe just and reasonable, § 15, pp. 853-855.
- Commission may establish joint, § 15, pp. 853-855.
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- Schedules filed with commission shall be *prima facie* evidence, § 16, pp. 855-858.
- Reduced, for certain classes of property, § 22, pp. 863, 864.
- Joint interchangeable mileage, § 22, pp. 863, 864.
- Remedy by mandamus against discriminations in, § 23, pp. 864, 865.
- Filed with commission by carrier shall be conclusively deemed to be legal rate, Elkins Act, § 1, pp. 843-845.
- Wilful failure of carrier to file, publish and observe, a midemeanor, Elkins Act, § 1, pp. 843-845.
- Persons affected by, may be made parties to proceedings, Elkins Act, § 2, p. 845.
- Proceedings in court instituted by commission, to compel discontinuance of unlawful acts as to, Elkins Act, § 3, pp. 846, 847.
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REASONABLE CHARGES.

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Carrier shall not remit or refund any portion of rates and charges specified in schedules, § 6, pp. 841-843.

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Officer, agent, etc., who gives or receives, shall be deemed to act for carrier or shipper, Elkins Act, § 1, pp. 843-845.

Shipper receiving, shall forfeit three times the amount, Elkins Act, § 1, pp. 843-845.

Jurisdiction of courts to punish, Elkins Act, § 1, pp. 843-845.

Fine and imprisonment on conviction of giving, Elkins Act, § 1, pp. 843-845.

Action by attorney-general to collect forfeit for receiving, Elkins Act, § 1, pp. 843-845.

Six years' statute of limitations on action for forfeits for receiving, Elkins Act, § 1, pp. 843-845.

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Of carriers, forfeit for failure to obey order, § 16, pp. 855-858.

Of carriers, provisions of Act giving power to commission to prescribe form of, and have access to, and right to inspect, accounts of carriers, applicable to, § 20, pp. 860-863.

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REMEDIES.

Shippers damaged must elect between complaint to commission or suit in federal court, § 9, p. 848.

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Carrier shall not remit any portion of rates or charges specified in schedules, § 6, pp. 841-843.

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3. Of carriers.

1. Annual reports of commission.

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7. General powers — Continued.

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(b) *Reports.*

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(c) *Books, records and accounts.*

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COMMISSION — Continued.**9. Powers as to, and control over, carriers** — Continued.*(c) Books, records and accounts* — Continued.

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Power to prescribe form of annual reports of gas and electrical corporations, § 66, subd. 6, pp. 618, 619.

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May change or add to form of annual reports of gas and electrical corporations and municipalities furnishing gas or electricity, § 66, subd. 6, pp. 618, 619.

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Power to prescribe time for submission of, and period to be covered by, annual reports of municipalities furnishing gas or electricity, § 66, subd. 7, p. 619.

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